1 Aff'd 2-135 Mr Justice Davis Submitted Dec 10

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~289.~~ 73

JOHN S. WILLS, JAMES Q. WILLS, WASHINGTON M. WILLS, AND RICHARD GREGG, PLAINTIFFS IN ERROR,

vs.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND EDWARD W. BANCROFT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1873.

Aff'd - Dec 15 to Circuit

SUPREME COURT OF THE UNITED STATES.

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1 Pleas in the circuit court of the United States for the northern of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said district, on Tuesday, the twenty-fourth day of December, in the December term of said court, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh year.

WILLIAM H. BRADLEY, *Clerk.*

HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft
vs.
JOHN S. WILLS, JAMES Q. WILLS, WASHINGTON M. Wills, and Richard Gregg. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-first day of December, in the
2 year of our Lord one thousand eight hundred and seventy-one, came Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, by their attorneys, plaintiffs in this suit, and filed their declaration, as restored, against John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg, defendants, together with the plea and stipulation thereto attached, in the office of the clerk of said court, in Chicago, in said district, and also at the same time filed their bond for costs in said entitled cause; which said bond, declaration, plea, and stipulation are respectively in words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA
Northern District of Illinois, ss:

Circuit court, March term, A. D. 1871.

HORACE B. CLAFLIN ET AL.
vs.
JOHN S. WILLS ET AL. } Law.

3 We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated this 21 day of December, A. D. 1871.

BENTLEY, BENNETT, ULLMANN AND IVES.

(Endorsed:) Filed Dec. 21st, A. D. 1871. Wm. H. Bradley, clerk.

4 *Declaration.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit of the United States for the northern district of Illinois, of the March term, A. D. 1871.

In this action, Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, who are each and all citizens of the State of New York, and

who are and for many years last past have been copartners in business at the city of New York, in the State of New York, under the firm-name and style of H. B. Claflin & Co., by Bentley, Bennett, Ullman & Ives, their attorneys, complain of John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg, who are each and all citizens of the State of Illinois and residents of the northern district of Illinois, and who were, on the sixteenth day of November, in the year eighteen hundred and sixty-nine, and for a long time prior thereto had been, copartners in business at the city of Chicago, in the State of Illinois, under the firm-name and style of Wills, Gregg, & Co., who have been duly summoned, etc., to answer unto the said plaintiffs in a plea of trespass on the case on premises: For that whereas one Simeon Pickard, of Leland, in the State of Michigan, heretofore, to wit, on the twelfth day of November, in the year eighteen hundred and sixty-nine, at Chicago, that is to say, at the northern district of Illinois, made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and therein and thereby promised to pay at the Fourth National Bank of Chicago, sixty days after the date thereof, to the order of the said defendants, by their said firm-name of Wills, Gregg, & Co., the sum of three hundred dollars for value received, and then and there delivered the said promissory note to the said defendants, as copartners as aforesaid. And one Kimball and one Butterfield, copartners, doing business at Stevens Point, in the State of Wisconsin, under the firm-name of Kimball & Butterfield, heretofore, to wit, on the sixteenth day of November, in the year eighteen hundred and sixty-nine, at Stevens Point, that is to say, at the northern district of Illinois, made their three certain promissory notes in writing, each bearing date a certain day and year therein named, to wit, the day and year last aforesaid, in and by the first of which said promissory notes, by their said firm-name of Kimball & Butterfield, they promised to pay at the bank of Messrs. Hungerford & Bros., Stevens Point, Wisconsin, sixty days after the date thereof to the order of the said defendants, by their said firm-name of Wills, Gregg & Co., the sum of five hundred dollars, with exchange on Chicago, for value received; by the second of which said promissory notes, by their said firm-name of Kimball & Butterfield, they promised to pay at the bank of Messrs. Hungerford & Bros., Stevens Point, Wisconsin, three months after the date thereof, to the order of the said defendants, by their said firm-name of Wills, Gregg & Co., the sum of fifteen hundred and twenty-six and $\frac{67}{100}$ dollars, with exchange on Chicago, for value received; by the third of which said promissory notes, by their said firm-name of Kimball & Butterfield, they promised to pay at the said bank of Messrs. Hungerford & Bros., Stevens Point, Wisconsin, four months after the date thereof, to the order of the said defendants, by their said firm-name of "Wills, Gregg & Co.," the sum of two thousand dollars, with exchange on Chicago, for value received; and the said Kimball & Butterfield then and there delivered the said three promissory notes to the said defendants, as copartners as aforesaid.

And the said defendants, as such copartners as aforesaid, to whom or to whose order as such copartners the payment of the said sum of money in each of the aforesaid four promissory notes specified was to be made, after the making of the said promissory notes, before the payment of the said sum of money in either of said promissory notes specified, to wit, on the twenty-seventh day of November, in the year eighteen hundred and sixty-nine, at the northern district of Illinois aforesaid, endorsed each of said four promissory notes by their said firm-name of

"Wills, Gregg & Co.;" by which said endorsement they, the said defendants, then and there ordered and appointed the said sum of money
9 in each of said four promissory notes specified to be paid to the said plaintiffs, as copartners as aforesaid, and then and there delivered each of the said promissory notes, so endorsed as aforesaid, to the said plaintiffs.

And the said plaintiffs aver that afterwards, when the said promissory notes became respectively due and payable, according to their terms respectively, each of said four promissory notes was on the day when by its terms it became due and payable, at the place of payment in it specified, to wit, at the northern district of Illinois aforesaid, duly presented and shown for payment thereof, and payment of the said sum of money therein specified was then and there duly required, according to the tenor and effect thereof, but that neither the said Fourth National Bank of Chicago, nor the said Messrs. Hungerford & Bros., nor the said Simeon Pickard, nor the said Kimball & Butterfield did or would,
10 at the times when the said promissory notes were respectively presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sums of money specified in said notes, or in either of them, or any part thereof, but wholly neglected and refused so to do; of all which said several premises the said defendants afterwards, to wit, at the time aforesaid, had notice.

And the plaintiffs aver that the said Simeon Pickard and the said Kimball and the said Butterfield were not, at the date of the aforesaid execution of their respective notes, residents of the State of Illinois, nor was either of them at the date of such execution a resident of said State, but that they were each and all, at the time of the execution by them of said notes respectively, ever since have been, and still are, non-residents of the State of Illinois, and were not, nor were either or any of them, within said State at the time when said notes, or any or either
11 of them, became due and payable; of all which said several premises the said defendants afterwards, to wit, at the time aforesaid, had notice. By means whereof, and by force of the statute in such case made and provided, the said defendants, as such copartners as aforesaid, then and there became liable to pay to the said plaintiffs the said sums of money in the said four promissory notes specified, when they, the said defendants, should be thereunto afterwards requested; and being so liable, said defendants, in consideration thereof, afterwards, to wit, at the time aforesaid, at the northern district of Illinois aforesaid, undertook and then and there faithfully promised said plaintiffs to pay them the sums of money in said notes specified when they, the said defendants, should be thereunto afterwards requested.

And also, for that whereas the said defendants as copartners as aforesaid, heretofore, to wit, on the twentieth day of March, in the year
12 of our Lord one thousand eight hundred and seventy, at the northern district of Illinois, became and were indebted to the said plaintiffs as copartners in the sum of six thousand dollars of lawful money of the United States of America for divers goods, wares, and merchandise by the said plaintiffs as copartners before that time sold and delivered to the defendants as such copartners, and at the special instance and request of the said defendants; and being so indebted to the said plaintiffs, the said defendants as such copartners, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards,

to wit, on the same day and year, and at the place aforesaid, in
13 consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendants, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiffs, the said defendant' as such copartners then and there undertook and faithfully promised the said plaintiffs that the said defendants would well and truly pay to the said plaintiffs so much money as the last aforesaid goods, wares, and merchandise, at the time of sale and delivery thereof, were reasonably worth, when the said defendants should be thereunto afterwards requested; and the said plaintiffs aver that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of six thousand dollars of like lawful money as afore-
14 said, to wit, at the place aforesaid, whereof the said defendants afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, as such copartners, were indebted to the said plaintiffs in the further sum of six thousand dollars of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiffs to the said defendants, and at the like request of the said defendants. And in the like sum for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendants, and at the request of the said defendants. And in the like sum for other money by the said defendants before that time had and received to and for the use of the said plaintiffs. And in the like sum for other money before that time and then due and owing the said plaintiffs for interest upon
15 and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiffs. And in the like sum for the price and value of work then done and material for the same provided by the plaintiffs for the defendants, and at the like special request of the defendants. And being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, as such copartners, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place
16 aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiffs, and then and there being in arrear and unpaid; and upon such accounting the said defendants then and there, as such copartners, were found to be in arrear and indebted to the said plaintiffs in the further sum of six thousand dollars of the like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs, and the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, as such copartners undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested.

Nevertheless, the said defendants (although often requested,
17 etc.) have not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same, or any part thereof, to the said plaintiffs,

the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiffs six thousand dollars, and therefore the said plaintiffs bring suit, etc.

BENTLEY BENNETT,
ULLMANN & IVES,
Plaintiffs' Attorneys.

18 *Copy of the notes sued on.*

$300.] CHICAGO, *Nov. 12th*, 1869.

For value received I promise to pay to the order of Wills, Gregg & Co., sixty days after date, three hundred dollars, at Fourth National Bank, Chicago.

(Signed) SIMEON PICKARD.

(Endorsed:) "WILLS, GREGG & CO."

[15 cts. rev. stamp, cancelled.]

$500.] STEVENS POINT, WIS., *Nov.* 16, 1869.

For value received we promise to pay to the order of Wills, Gregg & Co., sixty days after date, five hundred dollars, at bank of Hungerford & Bros., Stevens Point, with exchange on Chicago.

(Signed) KIMBALL & BUTTERFIELD.

(Endorsed:) "WILLS, GREGG & CO."

[25-ct. rev. stamp, cancelled.]

19 $1,526.67.] STEVENS POINT, WIS., *Nov. 16th*, 1869.

For value received we promise to pay to the order of Wills, Gregg & Co., three months after date, fifteen hundred twenty-six and $\frac{67}{100}$, at bank of Hungerford & Bros., Stevens Point, with exchange on Chicago.

(Signed) KIMBALL & BUTTERFIELD.

(Endorsed:) "WILLS, GREGG & CO."

[80-ct. rev. stamp, cancelled.]

$2,000.] STEVENS POINT, WIS., *Nov. 16th*, 1869.

For value received we promise to pay to the order of Wills, Gregg & Co., four months after date, two thousand dollars, at bank of Hungerford & Bros., Stevens Point, with exchange on Chicago.

(Signed) KIMBALL & BUTTERFIELD.

(Endorsed:) "WILLS, GREGG & CO."

[$1.00 U. S. rev. stamp, cancelled.]

20 *Plea.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois, of the March term, A. D. 1871.

JOHN S. WILLS, JAMES Q. WILLS, WASHINGTON M. WILLS, and Richard Gregg
ats.
HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft.
} Assumpsit.

And now come the said defendants, by Goudy & Chandler, their attorneys, and defend the wrong and injury, etc., when, etc., and say that

they did not undertake or promise, in manner and form as the said plaintiffs have above thereof complained against them, and of this they put themselves upon the country, etc.

And the said plaintiffs do the like.

21 GOUDY & CHANDLER,
Defts.' Attys.
BENTLEY BENNETT,
ULLMANN & IVES,
Plffs.' Attys.

Stipulation.

In the circuit court of the United States for the northern district of Illinois.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft
vs.
JOHN S. WILLS, JAMES Q. WILLS, WASHINGton M. Wills, and Richard Gregg.

It is hereby stipulated that the declaration and plea hereto attached may be filed by the clerk of said court in place of, and be substituted for, and restored as, the declaration and plea in said action destroyed by the fire of October 9th, 1871.

Dated November 25th, 1871.

BENTLEY BENNETT,
ULLMANN & IVES,
Plff.s' Attys.
22 GOUDY & CHANDLER,
Deft.s' Attys.

(Endorsed:) Filed Dec. 21, 1871. Wm. H. Bradley, clk.

On this day, to wit, the 21st day of December, A. D. 1871, in the December term, A. D. 1871, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Leave to file new declaration & plea.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft
vs.
JOHN S. WILLS, JAMES Q. WILLS, WASHINGton M. Wills, and Richard Gregg. } Assumpsit.

Now come the plaintiffs, by their attorneys, Bentley Bennett, Ullmann & Ives, and on their motion, and as per stipulation filed, leave is given them to file a new declaration and plea in this cause; and it is ordered
23 that they be substituted for and stand in place of the original declaration and plea heretofore filed herein, and destroyed by fire on the ninth day of October last.

On this day, to wit, the 17th day of October, in the October term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Leave to file 2d count.

HORACE B. CLAFLIN ET AL.
vs.
JOHN S. WILLS ET AL.
} Assumpsit.

On motion of the plaintiffs, by their attorneys, leave is given them to file an additional count to the declaration.

On the same day, to wit, the 17th day of October, A. D. 1872, said plaintiffs, by their attorneys, filed in said clerk's office their second count to declaration, together with the notice and acceptance of service of same thereto attached, in said entitled cause, which are in the words and figures following, to wit:

24 *2d count to declaration.*

In the circuit court of the United States for the northern district of Illinois.

HORACE B. CLAFLIN, EDWARD E. EAMES, and Edward W. Bancroft,
vs.
JOHN S. WILLS, JAMES Q. WILLS, WASHINGton M. Wills, and Richard Gregg.
} In assumpsit.

Proposed second count to the plaintiffs' declaration in the above-entitled action.

And also for that whereas one Simeon Pickard heretofore, to wit, on the twelfth day of November, in the year eighteeen hundred and sixty-nine, at Chicago, that is to say, at the northern district of Illinois, made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and therein and thereby promised to pay at the Fourth National Bank of Chicago, sixty days after the date thereof, to the order of the said defendants,
25 by their said firm-name of "Wills, Gregg & Co.," the sum of three hundred dollars, for value received, and then and there delivered the said promissory note to the said defendants as copartners as aforesaid, and one Kimball and one Butterfield, copartners doing business under the firm-name of "Kimball & Butterfield," heretofore, to wit, on the sixteenth day of November, in the year eighteen hundred sixty-nine, at Stevens Point, that is to say, at the northern district of Illinois, made their three certain promissory notes in writing, each bearing date a certain day and year therein named, to wit, the day and year last aforesaid, in and by the first of which said promissory notes, by their said firm-name of "Kimball & Butterfield," they promised to pay, at the bank of Messrs. Hungerford & Bros., Stevens Point, Wisconsin, sixty days after the date thereof, to the order of the said defendants, by their said firm-name of "Wills, Gregg & Co.," the sum of five hundred dollars, with exchange on Chicago, for value received; by the second
26 of which said promissory notes, by their said firm-name of "Kimball & Butterfield," they promised to pay, at the bank of Messrs. Hungerford & Bros., Stevens Point, Wisconsin, three months after the date thereof, to the order of the said defendants, by their said firm-name of "Wills, Gregg & Co.," the sum of fifteen hundred and twenty-six &

$\frac{67}{100}$ dollars, with exchange on Chicago, for value received; by the third of which said promissory notes, by their said firm-name of "Kimball & Butterfield," they promised to pay, at the said bank of Messrs. Hungerford & Bros., Stevens Point, Wisconsin, four months after the date thereof, to the order of the said defendants, by their firm-name of "Wills, Gregg & Co.," the sum of two thousand dollars, with exchange on Chicago, for value received; and the said Kimball and Butterfield then and there delivered the said three promissory notes to the said defendants, as copartners as aforesaid.

And the said defendants, as such copartners as aforesaid, to whom or to whose order as such copartners the payment of the said sums
27 of money in each of the aforesaid four promissory notes specified was to be made, after the making of the said promissory notes, before the payment of the said sum of money in either of said promissory notes specified, to wit, on the twenty-seventh day of November, in the year eighteen hundred sixty-nine, at the northern district of Illinois aforesaid, endorsed each of said four promissory notes by their said firm-name of "Wills, Gregg & Co.," by which said endorsement they, the said defendants, then and there ordered and appointed the said sum of money in each of said four promissory notes specified to be paid to the said plaintiffs, as copartners as aforesaid, and then and there delivered each of the said four promissory notes, so endorsed as aforesaid, to the said plaintiffs.

And the said plaintiffs aver that afterwards, when the said promissory notes became respectively due and payable, according to their terms respectively, each of said four promissory notes was on the day when by its terms it became due and payable, at the place of payment in
28 it specified, to wit, at the northern district of Illinois aforesaid, duly presented and shown for payment thereof, and payment of the said sum of money therein specified was then and there duly required according to the tenor and effect thereof; but that neither the said Fourth National Bank of Chicago, nor the said Messrs. Hungerford & Bro., nor the said Simeon Pickard, nor the said Kimball, nor the said Butterfield, did or would at the times when the said promissory notes were respectively presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sums of money specified in said notes, or in either of them, or any part thereof, but wholly neglected and refused so to do; of all which said several premises the said defendants afterwards, to wit, at the time aforesaid, had notice.

And the plaintiffs aver that, at the time when each of said promissory notes became by its terms due and payable, the said Simeon Pickard, and the said Kimball, and the said Butterfield were each and all insolvent and unable to pay the amount of the notes by them
29 respectively subscribed as aforesaid, or any part thereof, and hitherto from thence have continued insolvent and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any portion thereof; and the said plaintiffs aver that the institution of a suit against the said Simeon Pickard, or against the said Kimball, or the said Butterfield, at the time the notes so by them as aforesaid respectively subscribed became due and payable, or at any time since, or now, would have been and would be wholly unavailing. Of all which the said defendants afterwards, to wit, at the time aforesaid, at the northern district of Illinois aforesaid, had notice. By means whereof, and by force of the statute in such case made and provided, the said defendants, as such copartners as aforesaid, then and there became

liable to pay to the said plaintiffs the said sums of money in the said four promissory notes specified when they, the said defendants, should be thereunto afterwards requested. And being so liable, said defend-
30 ants, in consideration thereof, afterwards, to wit, at the time aforesaid, at the northern district of Illinois aforesaid, undertook, and then and there faithfully promised, said plaintiffs to pay them the sums of money in said notes specified when they, the said defendants, should be thereunto afterwards requested.

In the circuit court of the United States for the northern district of Illinois.

HORACE B. CLAFLIN, EDWARD E. EAMES, and Edward W. Bancroft
vs.
JOHN S. WILLS, JAMES Q. WILLS, Washington M. Wills, and Richard Gregg.
} In assumpsit.

To Messrs. Goudy & Chandler, defts.' attys.:

You will please take notice that on Thursday morning, October 17th, A. D. 1872, at the opening of court on that day, or as soon thereafter as counsel can be heard, we shall move the court for leave to file the annexed proposed second count to the plaintiffs' declaration in the above-entitled action, and ask for an order that it be taken and
31 considered as a part of said declaration, and as the second count thereof.

Yours, &c.,
BENTLEY, BENNETT, ULLMANN & IVES,
Pltffs' Attys.

Dated October 15th, 1872.

We hereby admit service of above notice and annexed proposed second count of declaration, by copy, this 15th day of October, A. D. 1872.
GOUDY & CHANDLER,
Defts.' Attys.

(Endorsed:) Filed Oct. 17, 1872. Wm. H. Bradley, clk.

On this day, to wit, the 7th day of November, in the October term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

Jury empanneled.

HORACE B. CLAFLIN ET AL.
vs.
JOHN S. WILLS ET AL.
} Assumpsit.

32 Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, N. S. Scoville, George Ekins, Nathan S. Grandy, J. G. Ragan, Michael Robinson, William Petty, Allen Sisson, George H. West, George H. Hunter, William G. Smith, John G. Kennedy, and Nathaniel Sleeper, who were all duly elected, tried, and sworn well and truly to try said issue, and, after hearing the evidence and the arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict,

and by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same and deliver it to the clerk and disperse.

On the next day, to wit, the 8th day of November, in said October term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

33 *Verdict, &c.*

HORACE B. CLAFLIN ET AL.
v.
JOHN S. WILLS ET AL. } Assumpsit.

The jury in this behalf empanneled and sworn this day returned into court their sealed verdict, wherein they say: We, the jury, find the issue for the plaintiffs, and assess their damages to the sum of five thousand and twenty-two dollars. And thereupon the defendants, by their attorney, move the court for a new trial herein.

On this day, to wit, the 23d day of December, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Motion argued.

HORACE B. CLAFLIN ET AL.
v.
JOHN S. WILLS ET AL. } Assumpsit.

34 Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendants heretofore entered herein for a new trial of this cause, and after hearing the arguments of counsel the court takes the same under advisement.

On this day, to wit, the 24th day of December, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

Judgment, &c.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft
vs.
JOHN S. WILLS, JAMES Q. WILLS, WASHINGTON M. Wills, and Richard Gregg. } Assumpsit.

The court having considered and being now fully advised upon the motion of the defendants, heretofore entered herein for a new trial of this cause, overrules the same.

It is thereupon considered and adjudged by the court that
35 the plaintiffs do have and recover of the defendants the said sum of five thousand and twenty-two dollars, their damages so as aforesaid assessed, together with their costs in this behalf expended, amounting to the sum of forty-four dollars and twenty-five cents, and that they have execution therefor.

36 On the hearing of said cause the following exceptions were taken, and were allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of exceptions.

United States circuit court, northern district of Illinois, December term, 1872.

HORACE B. CLAFLIN ET AL. *vs.* JOHN S. WILLS ET AL. } Bill of exceptions.

Be it remembered that on the trial of this cause upon the issues, before a jury, the plaintiffs proved that at the time the suit was commenced certain notes purporting to be executed by Simon Pickard and
37 Kimball & Butterfield to the defendants, by the name of Wills, Gregg & Co., and by them assigned to the plaintiffs, were in the hands Bentley, Ulman & Ives, attorneys for the plaintiffs, and they were described in the original declaration; that said notes were kept by them, said attorneys, until the 9th day of October, 1871, when these notes were destroyed by fire in the city of Chicago, and at the same time the original papers filed in this case, including the declaration and all the records of the court, were also destroyed by fire.

The plaintiff then offered to prove by parol the contents of said notes, to which the defendants objected, because the declaration now on file, and to which the plea was filed, did not count on lost notes; but the court overruled the objection, and decided that parol evidence as to the contents thereof might be received, to which decision the defendants excepted.

38 Frederic Ullmann, one of the plaintiffs' attorneys, then testified that he made the copies of the notes attached to the declaration now on file, from the contents of a letter written by Cyrus Bentley, of the firm of Bentley & Hart, to the plaintiffs, which reads as follows, to wit:

"CHICAGO, *Nov.* 27, 1869.

"Messrs. H. B. CLAFLIN & Co., *New York:*

"GENTLEMEN: As to Wills, Gregg & Co., we have finally got from them the Kimball & Butterfield paper, and herein enclose the same, as follows:

"1. Note of Kimball & Butterfield, dated Nov. 16, '69, at 30 days, to order of Wills, Gregg & Co., & by them endorsed in blank for $500, payable at bank of Hungerford & Bros., Stevens Point, with exchange on Chicago	$500 00
"2. Note of same, same date, at 60 days, to same order, endorsed in same manner, payable in same manner, with exchange on Chicago, for	$500 00
39 "3. Note of same, same date, at three months, to same order, endorsed in same manner, payable in same manner, for	$1,526 67
"4. Note of same date, at four months, to same order, endorsed in same manner, and payable in same manner, for	$2,000 00
	4,526 67

"The above notes, you perceive, are dated the 16th inst., long after the goods were sold, contrary to the agreement, as W., G. & Co. say. In addition to the above they turned out a note as follows:

"5. Note of Simeon Pickard, of Leland, Mich., dated Nov. 12, '69, payable 60 days, to order of Wills, Gregg & Co., & by them endorsed in blank, payable at 4th National Bank, Chicago, for $300 00

"Making total amount of notes 4,826 67

"All which please find enclosed herein. We are not aware that we can squeeze anything more out of these gentlemen, & after a final & thorough going over of the whole subject shall put them in bankruptcy, unless we get a protest from you against it within the next four or five days. Mess. W., G. & Co. may possibly have supposed that by employing us to bring suits against Barnum & Co., we may hold off in your matters, but they will find the contrary. We saw no objection to bringing suits for them, if they paid us for so doing, and if there is any benefit resulting from the suits, & we put them into bankruptcy, the creditors (& we suspect you are about all the creditors they have) will reap such benefit. We have had these notes in hand two or three days, but we have been tied to the court-room for four days, trying a suit against an insurance co. that tried to evade payment of a loss on technical grounds, but we beat them handsomely, and now we turn to other work.

"Yours, resp'y,

"BENTLEY & HART."

Also, from a letter written by the plaintiffs to said Bentley, Ullmann & Ives, which reads as follows, to wit:

"NEW YORK, *Nov.* 21, 1871.

"Messrs. BENTLEY, ULLMANN & IVES,

40 "*Attys. at Law, Chicago, Ill.:*

"GENT': Replying to your letter of Nov. 6, we have to say that you had for col'n of us S. Pickard's note, dated Nov. 12 @ 60 ds. 300.

Protest 2.57	302 57
Kimball & Butterfield note, Nov. 16, 60 ds., 500. Protest 1.75..	501 75
Do. do., Nov. 16, 3 mos., 1,526.67. Protest 3	1,529 67
Do. do., Nov. 16, 4 mos., 2,000.00. Protest 1.75	2,001 75

"The first note of Kimball & B. for $500, 30 ds., was paid, so that it left us three (3) notes unpaid & the Pickard note. We trust this will be sufficient for your purpose.

"Yours, truly,

"H. B. CLAFLIN & CO."

That he drew the original declaration from the original notes then before him, and from his recollection of the same, aided by said letters, he believed the copies attached to the substituted declaration to be substantial copies of those destroyed, and on which the suit was brought.

And that said notes were duly endorsed by said defendants,

41 Wills, Gregg & Co.

CYRUS BENTLEY also testified that, acting as the attorney of the plaintiffs, he received the notes from one of the defendants, Washington M. Wills, in November, 1869, who at that time told him that Pickard resided in Leland, Michigan, and Kimball & Butterfield at

Stevens Point, Wisconsin. He also testified that he sent the notes, with the letter first above mentioned in evidence, to the plaintiffs in New York, who kept them until about March, 1871, when they returned them to him to commence this suit. The assignment on the back of the notes was made in the presence of the witness by defendant Washington M. Wills, in Chicago, Illinois, in November, 1869, at the time they were delivered to the witness for plaintiffs.

The plaintiffs then called JOHN J. MCCLELLAND, who testified that he was a lawyer, residing in Chicago; that he had very little
42 personal acquaintance with Simon Pickard, but that in the spring & summer of 1870 he had correspondence with said Pickard, who purported from his letters to reside at Leland, Michigan, and be engaged in business, and also to be postmaster there.

That in the spring or early part of the summer of 1870 he met Pickard in the city of Chicago, and he told him then that he still lived in Leland, Michigan, and was postmaster there.

The plaintiffs then called S. E. DALE, who testified that he was a lawyer in Chicago; that the firm of Carter, Becker & Dale, of which he was a member, had certain claims in favor of Hamlin, Hale & Co., of Chicago, and others against Kimball & Butterfield for collection, consisting of acceptances addressed to them at Stevens Point, Wisconsin, in the fall of 1869; that Kimball was in the office of the witness
43 in Chicago several times in January, February, and March, 1870, in regard to that business; that his firm commenced proceedings in bankruptcy against Kimball & Butterfield in the United States district court at Milwaukie, which resulted in a settlement of the demands thus held, and that the proceedings in bankruptcy were afterwards dismissed; thinks they paid fifty cents on the dollar on the demands held by his firm.

The plaintiffs then proposed and offered to read in evidence the following transcript of a record, to wit:

Transcript.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, John M. Miller, clerk of the district court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom and of the whole thereof now on file and remaining of record in my office.

44 In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said eastern district of Wisconsin, this 21st day of October, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL OF THE COURT.] J. M. MILLER, *Clerk.*

Creditors' petition.

To the honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin:

The petition of James F. Hunt, Frederick A. Hunt, Edward Barbour, and Robert W. Hale, copartners in business in the city of Chicago and State of Illinois, under the firm-name & style of Hunt, Barbour & Hale, respectfully shows that they are creditors of Kimball & Butter-

field, who, for a period of four months next preceding the date of the filing of this petition, have resided at Stevens Point, in the county of Portage, and State of Wisconsin, and district aforesaid.

45 That your petitioners' demand is provable against the said Kimball & Butterfield in accordance with the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy through the United States," approved March 2, 1867; that they believe that said Kimball & Butterfield owe debts to an amount exceeding the sum of three hundred dollars; that your petitioners' demand exceeds the sum of two hundred and fifty dollars, and that the nature of your petitioners' demand against the said Kimball & Butterfield is as follows: An acceptance for goods, wares, and merchandise sold and delivered to said Kimball & Butterfield, at their request, amounting to seven hundred three dollars and ninety-six cents, due and payable on or about the 8th of December, 1869; also, an open account for goods, wares, and merchandise sold said Kimball & Butterfield by said Hunt, Barbour & Hale, at their request, on the 22d day of November, 1869, and amounting to the sum of three hundred and sixty-two dollars and fifty-six cents,

46 both of which said sums are wholly due and unpaid.

And your petitioners further represent that within the six calendar months next preceding the date of this petition the said Kimball & Butterfield did commit an act of bankruptcy within the meaning of said act, to wit: In that the said Butterfield did heretofore, to wit, on the day of January, A. D. 1870, depart out of and from the State of Wisconsin, of which he is an inhabitant as aforesaid, with intent to defraud his creditors.

And your petitioners further represent that, within the six calendar months next preceeding the date of this petition, the said Kimball and Butterfield did commit an act of bankruptcy within the meaning of said act, to wit: In that the said Kimball & Butterfield, on the 13th day of January, 1870, at Stevens Point, in the county of Portage & district aforesaid, being possessed of certain estate, property, rights, or credits, to wit: A stock of goods, wares, and merchandise, situated in their store at said Stevens Point, did make an assignment of the same to one John Curran, of said Stevens Point, in the county and district aforesaid,

47 with intent to hinder, delay, or defraud the creditors of them, the said Kimball & Butterfield.

And your petitioners further represent that, within the six calendar months next preceding the date of the filing of this petition, the said Kimball & Butterfield did commit an act of bankruptcy within the meaning of said act, to wit: In that the said Kimball & Butterfield, on or about the 8th day of December, 1869, being merchants, have fraudulently suspended (and have not resumed) payment of their commercial paper within a period of fourteen days. Wherefore your petitioners pray that the said Kimball and Butterfield may be declared bankrupts, and that a warrant may be issued to take possession of their estate, that the same may be distributed according to law; that a warrant may be issued for the arrest of said Kimball and Butterfield, and to take possession provisionally of the property & effects of said Kimball & Butterfield, and that such further proceedings may be had thereon as the law in such case prescribes.

HUNT, BARBOUR & HALE,
By ROBERT W. HALE,
Petitioners.

48 DAVIS & FLANDERS,
Attorneys.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Robert W. Hale, one of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by me are true, so far as the same are stated of my own knowledge, and that those matters that are stated therein on information and belief are true according to the best of my knowledge, information, and belief.

ROBERT W. HALE,
Petitioner.

Subscribed and sworn to before me this 18th day of January, A. D. 1870.

E. A. DRUMMOND,
U. S. Com'r.

(Endorsed:) Filed January 20, A. D. 1870, at 10 o'clock a. m. J. M. Miller, clerk.

Creditor's petition.

To the honorable Andrew G. Miller, judge of the district of the United States for the district of Wisconsin:

49 The petition of Edward Guenther, of the city of Milwaukee, in the county of Milwaukee and State of Wisconsin, respectfully shows that he is a creditor of G. W. Kimball and William Butterfield, copartners under the firm-name of Kimball & Butterfield, who for a period of six months next preceeding the date of the filing of this petition, have resided at Stevens Point, in the county of Portage, and State of Wisconsin, and district aforesaid; that your petitioner's demand provable against the said Kimball & Butterfield in accordance with the provisions of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; that he believes that said Kimball & Butterfield owe debts to an amount exceeding the sum of three hundred dollars; that your petitioner's demand exceeds the amount of two hundred and fifty dollars, and that the nature of your petitioner's demand against the said Kimball & Butterfield is as follows:

Your petitioner on the 9th day of November, 1869, sold and delivered to said Kimball & Butterfield goods, wares, & merchandise, of the value & at the price of three hundred and ninety-one $\frac{75}{100}$ dollars, and, on the 17th of November last, sold them goods, wares, &
50 merchandise of the value & at the price of ninety-three $\frac{50}{100}$ dollars, all of which is wholly unpaid.

And your petitioner further represent that within six calendar months next preceeding the date of this petition the said Kimball & Butterfield did commit an act of bankruptcy within the meaning of said act, to wit: In that the said Kimball & Butterfield did heretofore, to wit, on the thirteenth day of January, A. D. 1870, being insolvent and in contemplation of insolvency, did make to one John Curran, of Stevens Point, in the county of Portage, State of Wisconsin, a conveyance and transfer of property, consisting of a stock of goods, wares, and merchandise, credits and accounts, with the intent by such disposition of their property to defeat or delay the operation of said act.

And your petitioner further represents, upon information and belief, that within the period aforesaid said Butterfield & Kimball committed

another act of bankruptcy within the meaning of said act, to wit: In that they did heretofore, to wit, on or about the 13th day of January,
51 1870, being possessed of certain property, to wit, a stock of merchandise, at Stevens Point aforesaid, did make conveyanses and transfers of large portions of the same to divers persons to your petitioner unknown, with intent to defraud their creditors. And your petitioner hath good reason to believe, and doth believe, that said Kimball & Butterfield have removed & concealed large portions of their property, and are now concealing the same, and are about to conceal the same, so far as they can; that said Butterfield has left or is about to leave the district of Wisconsin, and he fears said Kimball may also leave the same.

Your petitioner prays the court may issue its warrant to the marshal of said district, commanding him to arrest said debtors, & forthwith to take possession provisionally of all the property and effects of the debtors, and by its injunction to restrain said John Curran from making any transfer or disposition of the property of said debtors, and
52 that said G. W. Kimball and William Butterfield may be declared bankrupt, and that a warrant may be issued to take possession of his estate, that the same may be distributed according to law, and that such farther proceedings may be bad thereon as the law in such case prescribes.

E. GUNTHEN, *Petitioner.*

BUTLER & WINKLER, *Attorneys.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, Edward Gunthen, the petitioner above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by me are true so far as the same are stated of my own knowledge, and that those matters that are stated therein on information and belief are true according to the best of my knowledge, information, and belief.

E. GUNTHEN, *Petitioner.*

Subscribed and sworn to before me this 25th day of January, A. D. 1870.

J. M. MILLER,
U. S. Com'r, Wis.

(Endorsed:) Filed January 25, A. D. 1870, at 11 o'clock a. m. J. M. Miller, clerk.

53 In the district court of the United States for the district of Wisconsin.

IN THE MATTER OF JAMES F. HUNT ET AL.
vs.
GEORGE W. KIMBALL & WILLIAM BUTTERfield, bankrupts. } In bankruptcy.

At Milwaukee, in said district, on the 29th day of January, A. D. 1870.

DISTRICT OF WISCONSIN, *ss:*

This cause came on to be heard at Milwaukee, in said court, and due proof being made of the service of the order to show cause why said George W. Kimball & William Butterfield should not be declared bank-

rupts, and they not appearing, said petitioning creditors appearing, by their attorneys; and thereupon, and upon consideration of the proofs in said cause, it was found that the facts set forth in said petition were true; and it is, therefore, adjudged that said George W. Kimball and William Butterfield became bankrupt within the true intent and
54 meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, before the filing of the said petition, and they are therefore declared and adjudged bankrupts accordingly.

And it is further ordered that the said bankrupts shall, within five days after the date of this order, make and deliver or transmit by mail, post paid, to the marshal, as messenger, a schedule of their creditors and inventory of their estate in the form and verified in the manner required of the petitioning debtor by the said act.

Witness the honorable Andrew G. Miller, judge of the said court, and the seal thereof, at Milwaukee, in said district, on the 29th day of January, A. D. 1870.

[SEAL.] J. M. MILLER,
Clerk of District Court for said District.

Served on the within-named George W. Kimball & William Butterfield by leaving for each a copy of this adjudication at their last usual place of abode, this 4th day of February, A. D. 1870.

C. S. HAMILTON, *Marshal*,
By PETER GROVER, *Deputy*.

55 (Endorsed:) Filed February 7, 1870, at 4 o'clock p. m.
J. M. MILLER, *Clerk*.

And the defendants objected thereto because it only professed to be a partial record and did not show when or how the proceeding had been disposed of, and because it was irrelevant and incompetent evi-
56 dence upon the pleadings and issues, but the court overruled the objections and allowed the transcript to be read in evidence to the jury; to which decision the defendants excepted.

And thereupon the plaintiffs rested.

And the defendants called N. K. FORNAN, who was sworn, and testified that he knew said Kimball; that he removed from Stevens Point, Wisconsin, to Chicago, Illinois, with his wife, (there were no children,) some time in January, 1870; that he formed a partnership with J. W. Gilbert, under the style of J. W. Gilbert & Co., in the auction business, and they carried on business on Clark street. Kimball had failed up at Stevens Point. The witness did not know how long Kimball staid in Chicago. The witness was book-keeper for W. B. Clapp & Co., merchants in Chicago.

On cross-examination the witness said that both Gilbert and
57 Kimball told him that they were equal partners. Kimball & Butterfield owed W. B. Clapp & Co. about $1,000 for goods bought for their Stevens Point store, but he did not know whether any of it was paid or not.

The defendants then called W. B. CLAPP, who was sworn, and testified that he was acquainted with said Kimball. He was in Chicago in the month of January of 1870, in business with J. W. Gilbert; they were partners, doing business as auctioneers, under the name of J. W. Gilbert & Co. His wife was in Chicago with him. He was here in January, 1870; cannot tell how long he remained, but he was here for one or two months, perhaps more.

The firm of J. W. Gilbert & Co. bought goods of W. B. Clapp & Co., which they sold at auction and paid for all the goods purchased.

On cross-examination the witness said that Kimball & Butter-
58 field were in debt to W. B. Clapp & Co. for goods purchased while they were in business at Stevens Point, to the amount of about $2,000, which had not been paid in full. They did not sue Kimball while in Chicago, because they did not think it would do any good and because J. W. Gilbert & Co. were trading with them. The witness did not have charge of the collection of debts; his mother did that, so he could not tell how much had been paid by Kimball & Butterfield.

This was all the evidence.

The court thereupon instructed and charged the jury as follows, to wit:

Charge to jury.

As has been stated by counsel, this is an action brought by plaintiffs, as assignees of certain promissory notes, against the defendants, as endorsers, and the questions involved are as to the liability of
59 defendants under the peculiar statute of the State of Illinois.

I will read you so much of the statute of Illinois as applies in the case:

"Every assignor or assignors, or his, her, or their heirs, executors, or administrators, of every such note, bond, bill, or other instrument in writing, shall be liable to the action of the assignee or assignees thereof, or his, her, or their executors or administrators, if such assignee or assignees shall have used due diligence by the institution and prosecution of a suit against the maker or makers of such assigned note, bond, bill, or other instrument of writing, or against his, her, or their heirs, executors, or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof: Provided that if the institution of such suit would have been unavailing, or that the maker
60 or makers had absconded or left the State when such assigned note, bond, bill, or other instrument in writing became due, such assignee or assignees, or his or her executors or administrators, may recover against the assignor or assignors, or against his or their heirs, executors, or administrators, as if due diligence by suit had been used."

Substantially the only question in controversy, then, in this case, upon which counsel have differed, and upon which any stress has been made on the trial of the case, is whether the evidence shows that the plaintiffs, Claflin & Co., were excused by the circumstances from having prosecuted a suit against the makers of these notes.

The statute requires, as you will see, that due diligence shall be used, by the institution and prosecution of a suit, but it further provides
61 that under certain circumstances the institution and prosecution of a suit need not be had; that is, if suit would be unavailing or the party had gone out of the State.

As far as the institution and prosecution of a suit is concerned, there is no evidence; on the contrary there is a direct admission that no suit was instituted, and no diligence used by the institution of a suit, against the makers of these notes; the plaintiffs relying solely for recovery in this case upon the exceptions in the statute which take them out of the general rule, and the exceptions which they rely upon are set forth in their declaration.

First. That at the time that these notes respectively matured the makers of the notes were non-residents of the State.

62 Upon this point you have heard the testimony, which is sub-

stantially this: that with reference to the first-named note in the declaration, the maker at the time the note was delivered to Claflin & Company was a resident of Leland, Mich., and the testimony of Mr. McClellan that through correspondence with Pickard, in the spring and summer of 1870, he learned that he still resided at Leland. If this evidence shall satisfy your minds that at the time the note became due, which is the point of time which fixes the liabilities of the assignor of the note, Pickard, the maker, resided out of the State of Illinois, then it was not necessary that the plaintiffs should commence a suit against Pickard in order to fix the liability of the assignors.

With reference to the Kimball and Butterfield notes, the evi-
63 dence on the part of the plaintiffs is that at the time the notes were transferred to plaintiff the defendant, by one of the members of the firm, represented and stated that the makers of the notes resided at Stevens Point, in the State of Wisconsin; and there is some other evidence, I think, by other witnesses to the same effect, that the firm of Kimball and Butterfield had their place of business at Stevens Point, Wis., during the fall and winter of the year 1869. But the defendant introduces testimony to show that in the early part of January, 1870, Kimball, one of the firm of Kimball and Butterfield, came to this city and engaged in a business enterprise here for some time; how long is left very indefinite. It will be for you to settle and reconcile how far this testimony establishes the defendant's case, or this branch
64 of it. If you shall believe from the evidence that at the time these notes matured, or any of them matured, Kimball was actually residing at the city of Chicago, residing here, then it was necessary to commence a suit against him here, unless a suit would have been unavailing; so that it is for you to consider and analyse the testimony in the case and determine from the testimony whether, at the time that any of these notes, or all of them, became due, Kimball was a resident of Chicago. He may have been a resident in January, and have left before the February and March notes became due. You will observe one became due in January and the others in February and March, and therefore it is possible, as you can see from the testimony, that
65 Kimball may have been within the jurisdiction of the courts of this State during the month of January, and may have left. The testimony leaves the court and jury in the dark as to where Kimball went when he left the city, nor are we informed as to how long he stayed. But the evidence of Mr. Clapp and his book-keeper Farnum would seem to indicate that his stay did not continue long. So much, then, with reference to the testimony touching the question of the excuse for the non-commencement of suit by reason of the parties being non-residents.

The next branch of the plaintiffs' case, by way of excuse for not commencing suit, is, that if they had commenced a suit it would have been unavailing. On this branch of the case we have the testimony of two or three witnesses. That of Mr. Dale is the most important. At
66 some time in the month of January his firm, being attorneys, had a collection against the firm of Kimball & Butterfield, then in business at Stevens Point, and instituted proceedings in bankruptcy against them in the U. S. court of Wisconsin; and we have here in evidence a transcript of the record, which shows that on the 29th of January, 1870, the petition having been filed on the 20th, the district court of the State of Wisconsin adjudged the firm of Kimball & Butterfield bankrupt. There is also testimony to the effect that after this party was thus adjudged the proceedings were dropped and dismissed by the attorneys who had prosecuted them.

If you shall believe from the testimony that at the time these notes

became due, that is during the months of January, February, and March,
this adjudication in bankruptcy rendered by the U. S. district
67 court of the State of Wisconsin was in force, that of itself would
excuse the plaintiff from the institution of a suit at law against the makers of these notes, because the bankrupt act prevents the institution and prosecution of suit against parties who are in bankruptcy; and if these parties were adjudged bankrupts it was the duty of the creditors to present their claims to the court in bankruptcy in Wisconsin. They had no right to prosecute in this or any other State, and an injunction would have issued to prevent the prosecution of such a suit if it had been instituted. I will say, in connection with this testimony, that if it appears from the evidence that the makers of these notes were adjudicated bankrupts, and the defendants wish to show or claim
that this adjudication was at any time set aside and the parties
68 placed back upon the footing of a discharge from this adjudication, it was their duty to have established the fact when the adjudication was set aside by testimony which showed that it became operative, so that the plaintiffs in this suit could have brought their suit at law at the next term of the court succeeding the maturity of the note or notes, otherwise the plaintiffs were excused from the diligence that the law required.

But, further than that, if there was no adjudication of bankruptcy, if you believe from the evidence in the case that the institution of a suit in this State against Kimball (he being the only one of the makers of the note who was within the jurisdiction of the State, so far as we
know) would have been unavailing, then the plaintiffs are ex-
69 cused; so that, although Kimball may have been here, if he was not possessed of visible property out of which these debts could have been made, if he was simply here with an interest in an auction firm which he could withdraw on any day, and which perhaps consisted merely in his personal services; if you are satisfied from the testimony that he had no visible funds, moneys, or assets within the State which could have been levied upon and from which the debts could have been collected; if you are satisfied that the firm of Kimball & Butterfield had failed, then, within the meaning of the law, the plaintiffs were excused, and the law would be for the plaintiffs.

The damages are the amount due on the notes, with interest from the
time they respectively became due, at six per cent. per annum.

70 And to such instructions and charge the defendants objected, and excepted to the use of the words "how long is very indefinite," and also to the words "he may have been a resident in January and left before the February and March notes became due," and also the words "nor are we informed as to how long he stayed," and also to the statement that the assignees, the plaintiffs, were not required by the law to institute a suit unless Kimball actually resided within the State of Illinois, in order to make the defendants liable as assignors, although the jury might believe from the evidence that he was within the jurisdiction of the courts of the State of Illinois, so as to be served
with process when one or more of the notes fell due.

71 And the defendants also objected and excepted to that portion of said charge which reads as follows: "If you shall believe from the testimony that at the time these notes became due, that is, during the months of January, February, and March, this adjudication in bankruptcy rendered by the U. S. district court of the State of Wisconsin was in force, that of itself would excuse the plaintiff from the institution of a suit at law against the makers of these notes, because the bankrupt act prevents the institution and prosecution of suits against

parties who are in bankruptcy; and if these parties were adjudged bankrupts it was the duty of the creditors to present their claims to the court in bankruptcy in Wisconsin. They had no right to prosecute in this or any other State, and an injunction would have issued to
72 prevent the prosecution of such suit if it had been instituted."

And the defendants objected and excepted to that portion of said charge which reads as follows:

"That although Kimball may have been here, if he was not possessed of visible property out of which these debts could have been made, if he was simply here with an interest in an auction firm which he could withdraw on any day, and which, perhaps, consisted merely in his personal services; if you are satisfied from the testimony that he had no visible funds, moneys, or assets within the State which could have been levied upon, and from which the debts could have been collected; if you are satisfied that the firm of Kimball & Butterfield had failed, then, within the meaning of the law, the plaintiffs were excused and the
73 law would be for the plaintiffs."

And thereupon the court overruled all of said objections, and instructed and charged the jury as aforesaid; to which the defendants excepted.

And after such charge was given to the jury they retired, and soon returned into court a verdict for the plaintiffs, and assessed the damages at $; and thereupon the court rendered judgment upon said verdict in favor of the plaintiffs and against the defendants; to which the said defendants excepted.

And forasmuch as the foregoing facts do not otherwise appear of record, the defendants pray that this their bill of exceptions be signed and sealed by the court, which is accordingly done.

H. W. BLODGETT, *Judge.* [SEAL.]

(Endorsed:) Filed Decb. 24th, 1873. Wm. H. Bradley, clk.

74 On this day, to wit, the 19th day of February, A. D. 1873, said defendants, by their attorneys, filed in said clerk's office their bond in said entitled cause, which said bond is in words and figures following, to wit:

Bond.

Supreme Court of the United States.

HORACE B. CLAFLIN, EDWARD E. EAMES, & Edward W. Bancroft,
vs.
JOHN S. WILLS, JAMES Q. WILLS, WASHINGton M. Wills, & Richard Gregg.

Know all men by these presents that we, John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg, and Thomas Lynch, W. N. Brainard, and George Miller, of Chicago, Cook County, Illinois, are held and firmly bound unto Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, of the city and State of New York, in the penal sum of eighty-five hundred dollars, lawful money of the
75 United States, to be paid to the said Claflin, Eames, and Bancroft, their executors or administrators. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this eighteenth day of February, A. D. 1873.

Whereas the above-named John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States of the northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their
76 plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN S. WILLS. [SEAL.]
WASHINGTON M. WILLS. [SEAL.]
JAMES Q. WILLS. [SEAL.]
RICHARD GREGG. [SEAL.]
THOMAS LYNCH. [SEAL.]
W. N. BRAINARD. [SEAL.]
GEO. MILLER. [SEAL.]

Approved:

H. W. BLODGETT,
Dist. Judge.

(Endorsed:) Filed Feb. 19, '73. Wm. H. Bradley, clk.

77 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein said Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft are plaintiffs, and said John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg are defendants, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in Chicago, in said district, this fourteenth day of August, in the year of our Lord eighteen hundred and seventy-three, and of our Independence the ninety-eighth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

78 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said court before you, between Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, plaintiffs, and John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg, defendants, a manifest error hath happened, to the great damage of the said John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Wash-

ington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done
79 therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this twenty-fifth day of December, A. D. 1872, and of our Independence the 97th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) Circuit court U. S. northern dist. of Illinois. Horace B. Claflin et al. vs. John S. Wills et al. Writ of error.

80 UNITED STATES OF AMERICA, *ss:*

To Horace B. Claflin, Edward E. Eames, & Edward W. Bancroft, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

81 Witness the honorable Salmon P. Chase, Chief-Justice of the said Supreme Court of the United States, this 31st day of December, in the year of our Lord one thousand eight hundred and seventy-two.

H. W. BLODGETT, *Judge.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Robert J. Fisher, jr., being duly sworn, deposes and says that he served the within citation by leaving a copy thereof with and exhibiting the original thereof to Messrs. Bentley Bennett, Ullman & Ives, attorneys for the defendants in error, the thirty-first day of December, A. D. 1872.

ROBERT J. FISHER, JR.

Sworn and subscribed to before me this second day of January, A. D. 1873.

E. A. DRUMMOND,
U. S. Coms.

(Indorsed:) Supreme Court of the United States. John S. Wills et al. vs. H. B. Claflin et al. Citation.

(Indorsement on cover:) No. 289. John S. Wills, James Q. Wills, Washington M. Wills, and Richard Gregg, plaintiffs in error, vs. Horace B. Claflin, Edward E. Eames, & Edward W. Bancroft. N. Illinois, C C. U. S. Filed 18th October, 1873.

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1875.

JOHN S. WILLS, JAMES Q. WILLS, WASHINGTON M. WILLS AND RICHARD GREGG,
Plaintiffs in Error,
v.
HORACE B. CLAFLIN, EDWARD E. EAMES AND EDWARD W. BANCROFT,
Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT.

W. C. GOUDY,
Att'y for Plaintiffs in Error.

CHICAGO:
BULLETIN PRINTING COMPANY, 132, 134 & 136 Monroe St., cor. Clark.
1875.

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1875.

JOHN S. WILLS, JAMES Q. WILLS, WASHINGTON M. WILLS AND RICHARD GREGG,
Plaintiffs in Error,
vs.
HORACE B. CLAFLIN, EDWARD E. EAMES AND EDWARD W. BANCROFT,
Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

I.

STATEMENT OF THE CASE.

Horace B. Claflin & Co., citizens of New York, commenced suit against Wills, Gregg & Co., citizens of the State of Illinois, and residents of the Northern District of Illinois, in the Circuit court for the Northern District of Illinois, on assignments of four promissory notes, which are as follows :

"$300.] CHICAGO, November 12, 1869.

"For value received, I promise to pay, to the order of

Wills, Gregg & Co., sixty days after date, three hundred dollars, at Fourth National Bank, Chicago.

(Signed), "SIMEON PICKARD.

(Endorsed), "WILLS, GREGG & Co."

[15 cts. Rev. Stamp Cancelled.]

"$500.] STEVENS POINT, WIS., Nov. 16, 1869.

"For value received we promise to pay to the order of Wills, Gregg & Co., sixty days after date, five hundred dollars, at Bank of Hungerford & Bros., Stevens Point, with exchange on Chicago.

(Signed), "KIMBALL & BUTTERFIELD.

(Endorsed), "WILLS, GREGG & Co."

[25 cts. Rev. Stamp cancelled.]

"$1526.67.] STEVENS POINT, WIS., Nov. 16, 1869.

"For value received we promise to pay to the order of Wills, Gregg & Co., three months after date, fifteen hundred, twenty-six and $\frac{67}{100}$ dollars at Bank of Hungerford & Bros., Stevens Point, with exchange on Chicago.

(Signed), "KIMBALL & BUTTERFIELD.

(Endorsed) "WILLS, GREGG & Co."

[80 cts. Rev. Stamp cancelled.]

"$2,000.] STEVENS POINT, WIS., Nov. 16, 1869.

"For value received, we promise to pay, to the order of Wills, Gregg & Co., four months after date, two thousand dollars, at Bank of Hungerford & Bros., Stevens Point, with exchange on Chicago.

(Signed), "KIMBALL & BUTTERFIFLD.

(Endorsed), "WILLS, GREGG & Co."

[$1.00 Rev. Stamp cancelled.]

The original declaration, after setting forth the execution of the notes by the makers and an assignment thereof by the defendants below, contains the following averment: "And the plaintiffs aver that the said Simeon Pickard and the said Kimball, and the said Butterfield were not, at the date of the aforesaid execution of their respective notes, residents of the State of Illinois, nor was either of them, at the date of such execution, a resident of said State, but that they were, each and all, at the time of the execution by them of said notes, respectively, ever since have been, and still are, non-residents of the State of Illinois, and were not, nor were either or any of them, within said State, at the time when said notes, or any or either of them became due and payable; of all of which said several premises, the said defendants, afterwards, to wit: at the time aforesaid, had notice."

Subsequently, an amended count was filed, which presents, as the ground of recovery, the following averment: "And the plaintiffs aver that, at the time when each of said promissory notes became, by its terms, due and payable, the said Simeon Pickard, and the said Kimball, and the said Butterfield, were each and all insolvent and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any part thereof, and hitherto from thence have continued insolvent and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any portion thereof; and the said plaintiffs aver that the institution of a suit against the said Simeon Pickard, or against the said Kimball, or the said Butterfield, at the time the notes so by them, as aforesaid, respectively subscribed, became due and payable, or at any time since, or now, would have been and would be wholly unavailing."

The defendants pleaded the general issue. On the trial, plaintiffs below, read in evidence the promissory notes with the defendants' endorsement in blank thereon. The note of Pickard fell due Jan. 14, 1870; and the three notes of Kimball and Butterfield fell due Jan. 18, Feb. 18, and March 19, 1870. It was proved by Cyrus Bentley, one of the plaintiff's attorneys, that he received the notes from one of the defendants, Washington M. Wills, in November, 1869, who, at the time, told him that Pickard resided at Leland, Michigan, and Kimball and Butterfield at Stevens Point, Wisconsin. He also testified that he sent the notes, with a letter previously read in evidence, to plaintiffs in New York, who kept them till March, 1871, when they were returned for the purpose of commencing this suit. The assignment on the back of the notes was made in presence of witness, by Washington M. Wills, in Chicago, in November, 1869, at the time they were delivered to witness for the plaintiffs. *Rec.* 12, 13.

The letter referred to by this witness is dated Chicago, November 27th, 1869, written by Bentley & Hart to H. B. Claflin & Co., New York. The letter gives a statement of the notes sued upon, which is enclosed therein, and then states: "We are not aware that we can squeeze anything more out of these gentlemen, and after a final and thorough going over of the whole subject shall put them in bankruptcy, unless we get a protest from you against it within the next four or five days. Messrs. W. G. & Co., may possibly have supposed that by employing us to bring suits against Barnum & Co., we may hold off in your matters, but they will find the contrary. We saw no objection to bringing suits for them, if they paid us for so doing, and if there is any benefit resulting from the suits, and we put them into bankruptcy, the creditors (and we

suspect you are about all the creditors they have), will reap such benefit. We have had these notes in hand two or three days, but we have been tied to the court room for four days trying a suit against an Insurance Co. that tried to evade payment of a loss on technical grounds, but we beat them handsomely, and now we turn to other work."

The plaintiffs then proved by John J. McClelland, certain facts tending to show that Pickard, in the spring and summer of 1870, resided at Leland, Michigan. *Rec.* 13.

The plaintiffs then proved by S. E. Dale that he was a lawyer in Chicago, and had certain claims in favor of Hamlin, Hale & Co., and others, against Kimball & Butterfield, consisting of acceptances addressed to them at Stevens Point, Wisconsin; in the fall of 1869; that Kimball was in the office with witness in Chicago in January, February and March, 1870, in regard to that business; that he commenced proceedings in bankruptcy against Kimball & Butterfield in Milwaukee, which resulted in a settlement of these demands and that the proceedings in bankruptcy were afterwards dismissed. *Rec.* 13.

Plaintiffs then offered to read in evidence the transcript of the record from the United States Court for the Eastern District of Wisconsin, showing the petition in bankruptcy by Hunt, Barbour & Hale, of Chicago, against Kimball & Butterfield, of Stevens Point, Wis., filed January 20, 1870, and an order entered January 29, 1870, adjudicating Kimball & Butterfield bankrupts. *Rec.* 15, 17.

The defendants objected to this transcript, because it only professed to be a part of the Record, and did not show when, nor how, the proceedings had been disposed of, and because it

was irrelevant and incompetent evidence upon the pleadings and issue. But the court overruled the objections, and allowed the transcript to be read in evidence to the jury. To which decision the defendants excepted. *Rec.* 17.

The defendants then proved, by N. K. Farnum, that Kimball removed from Stevens Point, Wisconsin, to Chicago, Illinois, with his wife, there being no children, some time in January, 1870, where he formed a partnership with J. W. Gilbert, under the style of J. W. Gilbert & Co., in the auction business, which they carried on in Clark street. He did not know how long Kimball stayed in Chicago. Both Gilbert and Kimball had told the witness that they were equal partners. The witness further testified that Kimball and Butterfield had failed at Stevens Point, and they owed W. B. Clapp & Co., for whom he was book-keeper, about $1,000, for goods supplied to them for their store at Stevens Point, but he did not know whether any of it had been paid or not.

The defendants then proved, by W. B. Clapp, that Kimball was in Chicago in the month of January, 1870, in business with J. W. Gilbert, doing business as auctioneers in the name of J. W. Gilbert & Co. His wife was in Chicago. He was in Chicago in January, 1870. Witness could not tell how long he remained. But he was there for one or two months, perhaps more. (Rec. 17.) The witness also testified that the firm of J. W. Gilbert & Co. bought goods of W. B. Clapp & Co., which they sold at auction, and they paid for all the goods purchased. The witness also testified that Kimball & Butterfield were in debt to W. B. Clapp & Co. for goods purchased while they were in business at Stevens Point, amounting to $2,000, which had not been paid in full. The witness did not have charge of the collection of debts, as his

brother had charge of that department, so he could not tell how much had been paid by Kimball & Butterfield.

This was all the evidence.

Charge to the Jury.

The court thereupon instructed and charged the jury as follows, to wit (Rec. 18–20):

"As has been stated by counsel, this is an action brought by plaintiffs, as assignees of certain promissory notes, against the defendants, as endorsers, and the questions involved are as to the liability of defendants under the peculiar statute of the State of Illinois.

"I will read to you so much of the statute of Illinois as applies in the case:

"'Every assignor, or assignors, or his, her or their heirs, executors or administrators, of every such note, bond, bill or other instrument in writing, shall be liable to the action of the assignee or assignees thereof, or his, her, or their executors or administrators if such assignee or assignees, shall have used due diligence by the institution and prosecution of a suit against the maker or makers of such assigned note, bond, bill, or other instrument of writing, or against his, her or their heirs, executors or administrators for the recovery of the money or property due thereon, or damages, in lieu thereof; Provided, that if the institution of such suit would have been unavailing, or that the maker or makers had absconded or left the State when such assigned note, bill or other instrument in writing became due, such assignee or assignees, or his or her executors or administrators may recover against the assignor

or assignors, or against his or their heirs, executors or administrators, as if due diligence by suit had been used.'

"Substantially, the only question in controversy then, in this case, upon which counsel have differed, and upon which any stress has been made on the trial of the case, is whether the evidence shows that the plaintiffs, Claflin & Co., were excused by the circumstances from having prosecuted a suit against the makers of these notes.

"The statute requires, as you will see, that due diligence shall be used, by the institution and prosecution of a suit, but it further provides that under certain circumstances, the institution and prosecution of a suit need not be had; that is, if suit would be unavailing or the party had gone out of the State.

"As far as the institution and prosecution of a suit is concerned, there is no evidence; on the contrary, there is a direct admission that no suit was instituted, and no diligence used by the institution of a suit, against the makers of these notes; the plaintiffs relying solely for recovery in this case upon the exceptions in the statute which take them out of the general rule, and the exceptions which they rely upon are set forth in the declaration.

"First. That at the time these notes respectively matured, the makers of the notes were non-residents of the State.

"Upon this point you have heard the testimony, which is substantially this: That with reference to the first-named note in the declaration, the maker, at the time the note was delivered to Claflin & Company, was a resident of Leland, Mich., and the testimony of Mr. McClelland that, through correspondence with Pickard, in the spring and summer of 1870 he

learned that he still resided at Leland. If this evidence shall satisfy your minds that at the time the note became due, which is the point of time which fixes the liabilities of the assignors of the note, Pickard, the maker, resided out of the State of Illinois, then it was not necessary that the plaintiffs should commence a suit against Pickard in order to fix the liability of the assignors.

"With reference to the Kimball & Butterfield notes, the evidence, on the part of the plaintiff, is that at the time the notes were transferred to the plaintiff, the defendant, by one of the members of the firm, represented and stated that the makers of the notes resided at Stevens Point, in the State of Wisconsin; and there is some other evidence, I think, by other witnesses to the same effect, that the firm of Kimball & Butterfield had their place of business at Stevens Point, Wis., during the fall and winter of the year 1869. But the defendant introduces testimony to show that in the early part of January, 1870, Kimball, one of the firm of Kimball & Butterfield, came to this city, and engaged in a business enterprise here for some time; how long is left very indefinite. It will be for you to settle and reconcile how far this testimony established the defendant's case, or this branch of it. If you shall believe, from the evidence, that at the time these notes matured, or any of them matured, Kimball was actually residing at the city of Chicago, residing here, then it was necessary to commence a suit against him here, unless a suit would have been unavailing; so that it is for you to consider and analyse the testimony in the case and determine from the testimony whether, at the time that any of these notes, or all of them, became due, Kimball was a resident of Chicago. He may have been a resident in January, and have left before the Feb-

ruary or March notes became due. You will observe one became due in January, and the others in February and March, and therefore, it is possible, as you can see from the testimony, that Kimball may have been within the jurisdiction of the courts of this State during the month of January, and may have left. The testimony leaves the court and jury in the dark as to where Kimball went when he left the city, nor are we informed as to how long he stayed. But the evidence of Mr. Clapp, and his book-keeper Farnum, would seem to indicate that his stay did not continue long. So much, then, with reference to the testimony touching the question of the excuse for the non-commencement of suit by reason of the parties being non-residents. The next branch of the plaintiffs' case, by way of excuse for not commencing suit, is, that if they had commenced a suit it would have been unavailing. On this branch of the case we have the testimony of two or three witnesses. That of Mr. Dale is the most important. At some time in the month of January, his firm, being attorneys, had a collection against the firm of Kimball & Butterfield, then in business at Stevens Point, and instituted proceedings in bankruptcy against them in the United States Court of Wisconsin; and we have here in evidence a transcript of the record, which shows that on the 29th of January, 1870, the petition having been filed on the 20th, the District Court of the State of Wisconsin adjudged the firm of Kimball & Butterfield bankrupt. There is also testimony to the effect that after this party was thus adjudged, the proceedings were dropped and dismissed by the attorneys who had prosecuted them.

"If you shall believe, from the testimony, that at the time these notes became due, that is during the months of January, February and March, this adjudication in bankruptcy, rendered

by the U. S. District Court of the State of Wisconsin, was in force, that of itself would excuse the plaintiffs from the institution of a suit at law against the makers of these notes, because the bankrupt act prevents the institution and prosecution of suits against parties who are in bankruptcy; and if these parties were adjudged bankrupts, it was the duty of the creditors to present their claims to the court in bankruptcy in Wisconsin. They had no right to prosecute in this or any other State, and an injunction would have issued to prevent the prosecution of such a suit, if it had been instituted. I will say, in connection with this testimony, that if it appears from the evidence that the makers of these notes were adjudicated bankrupts, and the defendants wish to show, or claim that this adjudication was at any time set aside, and the parties placed back upon the footing of a discharge from this adjudication, it was their duty to have established the fact when the adjudication was set aside, by testimony which showed that it became operative, so that the plaintiffs in this suit could have brought their suit at law at the next term of the court succeeding the maturity of the note or notes, otherwise the plaintiffs were excused from the diligence that the law required.

"But, further than that, if there was no adjudication of bankruptcy, if you believe, from the evidence in the case, that the institution of a suit in this State, against Kimball (he being the only one of the makers of the notes who was within the jurisdiction of the State, so far as we know), would have been unavailing, then the plaintiffs are excused; so that although Kimball may have been here, if he was not possessed of visible property out of which these debts could have been made, if he was simply here with an interest in an auction firm, which he could withdraw on any day, and, which, per-

haps consisted merely in his personal services; if you are satisfied, from the testimony, that he had no visible funds, moneys, or assets within the State, which could have been levied upon, and from which the debts could have been collected; if you are satisfied that the firm of Kimball & Butterfield had failed, then, within the meaning of the law, the plaintiffs were excused, and the law would be for the plaintiffs. The damages are the amount due on the notes, with interest from the time they respectively became due, at six per cent. per annum."

EXCEPTIONS TO CHARGE.

And to such instructions and charge the defendants objected, and excepted to the use of the words "how long is very indefinite," and also to the words "he may have been a resident in January, and left before the February and March notes became due," and also the words "nor are we informed as to how long he stayed;" and also to the statement that the assignees, the plaintiffs, were not required by the law to institute a suit, unless Kimball actually resided within the State of Illinois, in order to make the defendants liable as assignors, although the jury might believe, from the evidence, that he was within the jurisdiction of the courts of the State of Illinois, so as to be served with process when one or more of the notes fell due.

And the defendants also objected and excepted to that portion of said charge which reads as follows: "If you shall believe, from the testimony, that at the time these notes became due, that is, during the months of January, February and March, this adjudication in bankruptcy rendered by the United States District court of the State of Wisconsin was in force, that of itself would excuse the plaintiff from the in-

stitution of a suit at law against the makers of these notes, because the bankrupt act prevents the institution and prosecution of suits against parties who are in bankruptcy; and if these parties were adjudged bankrupts, it was the duty of the creditors to present their claims to the court in bankruptcy in Wisconsin. They had no right to prosecute in this or any other State, and an injunction would have issued to prevent the prosecution of such suit if it had been instituted."

And the defendants objected and excepted to that portion of said charge which reads as follows: "That, although Kimballmay have been here, if he was not possessed of visible property out of which these debts could have been made; if he was simply here with an interest in an auction firm which he could withdraw on any day, and which, perhaps, consisted merely in his personal services; if you are satisfied, from the testimony, that he had no visible funds, moneys or assets within the State which could have been levied upon, and from which the debts could have been collected; if you are satisfied that the firm of Kimball & Butterfield had failed, then, within the meaning of the law, the plaintiffs were excused, and the law would be for the plaintiffs."

II.

ASSIGNMENT OF ERRORS.

The plaintiffs in error say that the Circuit court of the United States, for the Northern District of Illinois, committed error to their injury and prejudice in the trial of the cause below, in this:

1. The court admitted a transcript from the record of the United States District court, for the Eastern District of Wisconsin, showing the adjudication in bankruptcy, upon a petition filed therein, of Kimball & Butterfield, when there was no allegation in the declaration that a suit against Kimball & Butterfield, as the makers of the notes, would be unavailing, because of the pendency of such bankruptcy proceedings.

2. Said court, after admitting such evidence, instructed the jury as follows: "If you shall believe, from the testimony, that at the time these notes became due—that is, during the months of January, February and March—this adjudication in bankruptcy, rendered by the United States District court, of the State of Wisconsin, was in force, that, of itself, would excuse the plaintiffs from the institution of a suit at law against the makers of these notes, because the bankrupt act prevents the institution and prosecution of suits against parties who are in bankruptcy; and if these parties were adjudged bankrupts, it was the duty of the creditors to present their claims to the court in bankruptcy in Wisconsin.

They had no right to prosecute in this, or any other State, and an injunction would have been issued to prevent the prosecution of such suit if it had been instituted," when there was no issue submitted to the jury which involved the inability of the endorsee to recover from the maker, because of the existence of bankruptcy proceedings against the makers of the notes.

3. Upon the issue as to the makers of the notes being without the jurisdiction of the courts of the State of Illinois at the time the notes were due, the court instructed the jury as follows: "But the defendant introduces testimony to show that in the early part of January, 1870, Kimball, one of the firm of Butterfield & Kimball, came to this city and engaged in a business enterprise here for some time; how long is left very indefinite. It will be for you to settle and reconcile how far this testimony establishes the defendants' case, or this branch of it. If you shall believe, from the evidence, that at the time these notes matured, or any of them matured, Kimball was actually residing at the city of Chicago, residing here, then it was necessary to commence a suit against him here, unless a suit would have been unavailing; so that it is for you to consider and analyse the testimony in the case and determine from the testimony whether, at the time that any of these notes, or all of them, became due, Kimball was a resident of Chicago. He may have been a resident in January, and have left before the February and March notes became due. You will observe one became due in January and the others February and March, and therefore it is possible, as you can see from the testimony, that Kimball may have been within the jurisdiction of the courts of this State during the month of January, and may have left. The testimony leaves

the court and jury in the dark as to where Kimball went when he left the city, nor are we informed as to how long he stayed. But the evidence of Mr. Clapp, and his book-keeper Farnum, would seem to indicate that his stay did not continue long."

And the court erred in the foregoing part of the charge by the statement that the assignees were not required, by law, to institute a suit unless Kimball *actually resided* within the State of Illinois, although the jury might believe, from the evidence, that he was within the jurisdiction of the courts of that State, so as to be served with process when one or more of the notes fell due; and in saying to the jury that Kimball may have been a resident in January and left before the February and March notes became due, and how long he remained in Chicago is very indefinite, and "nor are we informed as to how long he stayed," because such statements were not justified by the evidence, and were calculated to mislead the jury.

4. Upon the issue as to the insolvency of the makers of the notes, the court instructed the jury as follows: "But, further than that, if there was no adjudication of bankruptcy, if you believe, from the evidence of the case, that the institution of a suit, in this State, against Kimball (he being the only one of the makers of the note who was within the jurisdiction of the State, so far as we know), would have been unavailing, then the plaintiffs are excused; so that, although Kimball may have been here, if he was not possessed of visible property, out of which these debts could have been made, if he was simply here with an interest in an auction firm which he could withdraw on any day, and which, perhaps, consisted merely in his personal services; if you are

satisfied, from the testimony, that he had no visible funds, moneys, or assets within the State, which could have been levied upon, and from which the debts could have been collected; if you are satisfied that the firm of Kimball & Butterfield had failed then, within the meaning of the law, the plaintiffs and the law would be for the plaintiffs." While the law the plaintiffs to prove the allegation of the declaration that both Kimball and Butterfield were insolvent when the notes matured, and continued to be insolvent until the suit was commenced.

III.

BRIEF OF THE ARG[illegible]

The defendants in error, assignees of certain promissory notes, sued the plaintiffs in error, assignors, on the contract of assignment, which was made in Illinois, and the liability thereon, to be determined by the provisions of the following section of a statute of Illinois, to-wit:

"§ 7. Every assignor or assignors, or his, her or their heirs, executors or administrators, of every such note, bond, bill, or other instrument in writing, shall be liable to the action of the assignee or assignees thereof, or his, her, or their executors or administrators, if such assignee or assignees shall have used due diligence, by the institution and prosecution of a suit against the maker or makers of such assigned note, bond, bill, or other instrument of writing, or against his, her, or their heirs, executors or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof: *Provided*, that if the institution of such a suit would have been unavailing, or that the maker or makers had absconded, or left the State, when such assigned note, bond, bill, or other instrument in writing became due, such assignee or assignees, or his or her executors or administrators, may recover against the assignor or assignors, or against his or their heirs, executors or administrators, as if due diligence by suit had been used."

Rev. Stat. of Ill., 1845, 772.

Gross' Compilation, 1869, 462.
Argument, 2.

The construction of this statute has been settled in Illinois by numerous decisions, and those applicable to the questions in this case, cited and quoted fully as follows, to wit:

Hilborn v. Artus, 3 Scam. 345.
Schuttler v. Piatt, 12 Ill. 419.
Pierce v. Short, 14 Ill. 146.
Mason v. Burton, 54 Ill. 353.
Crouch v. Hall, 15 Ill. 264.
Bledsoe v. Graves, 4 Scam. 385.
Argument, pp. 3–9.

The plaintiffs below filed two counts in their declaration, and in each of which they presented a ground of recovery on the assignment. No diligence to collect from the makers of the notes by suit was claimed, but reliance was placed on the other two branches of the statute as an excuse for not instituting a suit.

The first count alleged as an excuse for not suing the makers, that they were not within the jurisdiction of the courts of Illinois when the notes matured.

The second count alleged as an excuse, that when the notes matured, and ever since that time, until the commencement of this suit, the makers were insolvent, and unable to pay, so that a suit against the makers would be unavailing.

The general issue was interposed to the declaration, so that the plaintiff was required to prove one of these counts, in order to recover.

The statute, as construed by the Supreme court of Illinois, makes an assignor of a promissory note liable only in one

of these events: 1. An exercise of diligence by the assignee to collect from the maker, by the institution and prosecution of a suit to judgment, and a return of execution, *nulla bona*. 2. Where such a suit would be unavailing for any legal reason, the diligence by suit is excused. 3. Where the maker is out of the jurisdiction of the court, so that he cannot be served with process when the assigned note matures, and until the time arrives when a suit could be commenced, diligence by suit is excused.

The plaintiff cannot allege generally, in the language of the statute, that a suit would be unavailing, and prove on the trial any fact which shows that it would be unavailing, but he must aver in his declaration the specific fact, or reason, why it would be unavailing, and he is confined in his proof to the fact alleged.

Crouch v. Hall, 15 Ill. 264.

Argument, 9, 10.

Errors of the Court Below.

1. The court admitted evidence that the makers were in bankruptcy in Wisconsin, directly after the first note of Kimball & Butterfield matured, as evidence tending to show that a suit against them would be unavailing, when it was not set up in either count of the declaration, and the only reason alleged was their insolvency.

2. The court then instructed the jury that it devolved on the defendants to prove a termination of the proceedings in bankruptcy, so that a suit could be sustained on the notes when they fell due, and that the existence of the adjudication was sufficient evidence that a suit would be unavailing, while

there was no such fact alleged in the declaration and no issue of that kind submitted to the jury.

Argument, pp. 11–14.

The ground of recovery set forth in the second count of the declaration, can only be construed to be that a suit would be unavailing, because of the insolvency of the makers, and not on account of the pendency of bankrupt proceedings.

Argument pp. 9, 10, 13.

Crouch v. Hall, 15 Ill. 264.

3. The court instructed the jury that *actual residence* in the State by the makers when the notes matured, was necessary to enable a suit to be brought and to impose the duty of diligence by suit on the assignee, when there was full proof that one of the makers was within the State of Illinois and subject to the process of its courts when one or more of the notes were due.

Argument 14–17.

Hilborn v. Artus, 3 Scam. 346.

Schuttler v. Piatt, 12 Ill. 419.

Pierce v. Short, 14 Ill. 146.

Mason v. Burton, 54 Ill. 354.

4. The court made statements as to facts not justified by the evidence, which had a tendency to mislead the jury upon the question of residence or presence within the jurisdiction of the court.

Argument 17–19.

5. The second count of the declaration declares that at the time when the assigned notes became due; the makers were insolvent and unable to pay the amount of the notes, *and from thence have continued insolvent* and unable to pay the amount of the notes or any portion thereof.

Insolvency, when the notes matured, when the assignee waited more than a year before suing the assignor, is not sufficient to justify a recovery; *but insolvency during the whole of the time between the maturity of the notes and the commencement of the suit must be alleged and proved.*

Bledsoe v. Graves, 4 Scam. 385.

The plaintiffs made such an averment, but they did not prove it.

The court did not present this rule of law, or the issue by the pleadings to the jury, but informed them that if they believed Kimball & Butterfield, the bankers, *had failed*, they would find against defendants. No time was fixed by the evidence, or the charge of the court when such failure was made. *Failure is not insolvency.*

The court assumed that an interest as a partner in an auction firm was a temporary and intangible interest, consisting of personal services, without proof, and informed the jury that if they were satisfied that Kimball had no visible funds, moneys, or assets in the State which could have been levied on, they would find for plaintiffs, disregarding the question of time.

Argument, 19–22.

6. *Conclusion.* The assignees did not rely upon the assignment, and neglected to sue the makers, or notify the assignors of non-payment, for fifteen months. The plaintiffs in error were surprised by evidence which was illegally admitted, and which, under the instructions of the court, was sufficient to compel a verdict against them. The merits of the case are with the plaintiffs in error.

Argument, 22–23.

IV.

ARGUMENT.

May it please your Honors:

The plaintiffs in error assigned four promissory notes to defendants in error. The assignment was made in the State of Illinois, and at that time the makers of the notes resided in Michigan and Wisconsin. One of these notes was executed by Pickard, who resided in Michigan, and, as there is no question in regard to the liability of the assignors upon that note, it is unnecessary to call any further attention to it. The other three notes were executed by Kimball & Butterfield, of Wisconsin, and were due January 18th, February 17th, and March 19th, 1870. The assignment was made in November, 1869, and immediately thereafter the notes were sent by the attorneys of defendants in error to them at New York, where they kept them till March, 1871, one year and more after the notes were due. No effort was made by the defendants in error to collect the notes, but they held them in New York without even presentment for payment. The letter of the attorneys for the defendants in error to them, which forwarded the notes, shows that there was no reliance placed upon the liability of the assignors. That letter disclosed the purpose of the attorneys to place the assignors in bankruptcy within a few days on the application of defendants in error, and shows that some art had been used to obtain the notes from the assignors. It is very clear, from these facts, that Claflin & Co.

did not rely upon the assignments, and had no expectation of resorting to them. After this inexcusable delay and neglect, this suit was commenced by Claflin & Co. against Wills, Gregg & Co. to recover on the assignment.

The liability of assignors in Illinois is regulated by the statute of that State, and not by the general rules of commercial law. The following is the section of the statute applicable to this case:

"Every assignor or assignors, or his, her, or their heirs, executors or administrators of every such note, bond, bill or other instrument in writing, shall be liable to the action of the assignee or assignees thereof, or to his, her, or their executors or administrators, *if such assignee or assignees shall have used due diligence, by the institution and prosecution of a suit* against the maker or makers of such assigned note, bond, bill, or other instrument of writing, or against his, her, or their heirs, executors, or administrators, for the recovery of the money, or property due thereon, or damages in lieu thereof; *provided, that if the institution of such suit would have been unavailing, or that the maker or makers had absconded, or left the State*, when such assigned note, bond, bill or other instrument in writing became due, such assignee, or assignees, or his or her executors, or administrators, may recover against the assignor, or assignors, or against his or their heirs, executors or administrators, as if due diligence by suit had been used." (Revised Statutes of Illinois, 1845, page 772; Gross' Compilation, 1869, page 462.)

The construction of this statute has been fixed in Illinois for many years. In *Bledsoe v. Graves*, 4 Scam. 385, the court say: "Under this statute there are three contingen-

cies in which the endorser may be made liable: First, when the assignee has used due diligence to collect the money by the institution and prosecution of a suit against the maker; second, when such suit could not have been instituted, by reason of the maker having left the State, or absconded when the note fell due; and, third, when the institution of a suit would have been unavailing."

"The enquiry now arises, whether the holder can delay proceedings both against the maker and endorser, after the maturity of the note, and afterwards hold the latter liable by showing the insolvency of the former when the note fell due, although the money might have been collected of him between that time and the institution of the suit against the endorser. We are of opinion that he cannot. If at any time the note falls due proceedings against the maker would be unavailing, the holder may proceed immediately against the endorser, but if he will not do this, he must be prepared, in order to fix the liability upon the endorser, to show that a suit against the maker would have been alike unavailing, in the intermediate time, while he retained the note. If he omit any opportunity of collecting the money of the maker, before he proceeds against the endorser, he is guilty of such laches as will discharge the latter. It was urged that the endorser might, by paying the amount, obtain the note, and himself embrace any opportunity of collecting it of the maker. But this argument is more plausible than just. The maturity of the note is passed, and the endorser hearing nothing of its dishonor, may well presume that it has been paid, or if not, that all legal measures have been adopted to coerce payment from the maker, which he could have instituted had he been in possession of the note himself. By the law merchant, the holder was bound to

notify the endorser of the non-payment of the note on the third day after it fell due, or his remedy against him was gone. This notice is dispensed with here; but sound policy and justice to the endorser require promptness and vigilance on the part of the holder. And the reason may be assigned why the endorser ought not to be bound to seek the holder and pay the note before he is entitled to the benefit of legal proceedings against the maker. The note has been put in circulation and may have passed through several hands; and he has no information where it may be found. We cannot doubt, if the law had intended to have imposed this duty upon him, it would not have dispensed with the notice formerly required. Here the holder has seen fit to lie by for two years, after the note fell due, before calling on the endorser for payment, or in any way informing him of the default of the maker. During this time the defendant may have seen the maker with abundant means in his hands to have paid the note, without supposing that he has any interest in his pecuniary circumstances, especially when he sees the holder looking on, and making no complaint, that the note has not been paid. To hold the defendant liable, under such circumstances, would be protecting one who has been guilty of neglect and delay at the expense of another who is guilty of no default. If he delays to prosecute the maker immediately, when he sues the endorser, he must show that the institution of a suit against the maker would have been unavailing, at any time intermediate between the maturity of the note and the commencement of proceedings against the endorser. If he is not bound to show the continued insolvency of the maker, he may, with the same propriety, select one period of the intermediate time as another, when he may establish that insol-

vency. And this is the construction which the plaintiff himself has put upon the statute; for he has averred, in his declaration, the continued insolvency of the maker till the commencement of this suit; and this is one of the issues between the parties, as tendered by the plaintiff himself, to which the instructions should have conformed."

In *Schuttler v. Piatt*, 12 Ill. 419, the court say, after quoting the statute: "There are three contingencies in which the assignor may be made liable. First, where the assignee, by the exercise of due diligence, prosecutes the matter to insolvency. Second, where the institution of a suit would be unavailing. Third, where the maker has absconded or left the State when the note falls due. The assignor, by a general indorsement of the note, binds himself to pay it on the happening of each of these contingencies. The provisions of the statute enter into and form a part of the contract of the parties. If the maker is beyond the State when the note matures, so that he cannot be subjected to our jurisdiction, the liability of the assignor becomes fixed. The assignee is not bound to pursue the debtor into a foreign jurisdiction, but he may at once resort to his assignor for payment."

In *Pierce v. Short*, 14 Ill. 145, the court say: "Our statute makes the assignor of a promissory note liable to the assignee, where the latter, by the exercise of due diligence, prosecutes the matter to insolvency; where a suit against the maker would be unavailing; and where the maker had absconded or left the State when the note fell due, or if assigned, after maturity, when the assignment was made. On the happening of one of these contingencies, and not otherwise, the assignee may at once resort to the assignor and recover back the amount paid for the note, as so much advanced upon a con-

sideration that has failed. He is not bound to give the assignor notice of non-payment as in the case of a bill of exchange or promisory note under the law merchant. *State Bank of Illinois v. Hawley*, 1 Scam. 580; *Hilborn v. Artus*, 3 *Ibid.* 344. The presentment of a note to the maker on the day it falls due, and notice of non-payment to the assignor, will not, under our statute, give the assignee any right of action against the assignor. The assignee must use due diligence to coerce payment from the maker, where such a course would result in the collection of the note. If he fails to do this, he loses all recourse upon the assignor, unless he can show, either that the note could not have been collected by the prosecution of a suit against the maker, or that the maker was out of the jurisdiction, and therefore beyond the reach of legal process."

In *Hilborn v. Artus*, 3 Scam. 345, the court say: "The act declares that if the institution of such suit would have been unavailing, or the maker or makers had absconded, or left the State when such assigned note, bond, bill or other instrument in writing became due, such assignee or assignees, etc., may recover against the assignor or assignors, if due diligence by suit had been used. The statute must not be read so as to prevent the maker of a note from crossing the river into Missouri, on his ordinary and usual business, nor should it be so construed as to subject the assignee of a note to the great delays which might result to him by a long and protracted absence of the maker, although not with the intention of making such absence permanent. Absconding and leaving the State are placed in juxtaposition in the act, and the existence of the latter fact, that of leaving the State at the time when, in order to fix the liability of the assignor, a suit should be commenced against

the makers, or after the first term after the note falls due, then the assignor is liable. It ought to be held his duty to see that the maker is present when the note falls due, so that he may be bound to be sued, or if he is not present, that the assignor should provide the means of payment. The assignor should be required to look to it and see that the maker's absence is not to prejudice the assignee. If the maker is leaving the State, the assignor has an opportunity to secure himself and can do so. He can protect himself against any loss that might arise by the permanent absence of the maker. This rule, we think, would be salutary in practice, and protect as well the interest of the assignor as the interest of the assignee."

In *Mason v. Burton*, 54 Ill. 353, the court say: "This was an action by Burton as endorsee of two promissory notes, against Mason, the endorser. The notes were given by one Hodson, and were payable to the order of Mason, at Chicago, Illinois. It was proven on the trial that the endorsement was made in Chicago, and that when the notes matured, Hodson was a resident of the State of Wisconsin. It was then admitted that the notes were made in Wisconsin, and that the maker lived there when they were made, and has lived there ever since.

"The counsel for appellant contends that the statute, which makes the endorser liable when the maker has left the State at the maturity of the note, cannot apply here, because the maker, not having lived in the State at all, cannot be said to have left it. We should not be inclined to give the statute a construction, based so completely upon its letter instead of its spirit, even if the question were a new one in this court. But it is not new. In *Schuttler v. Piatt*, 12 Ill. 418, the maker of the note, as in this case, resided in Wisconsin, and

the court held, if he was beyond the limits of the State at the maturity of the note, so that he could not be subjected to our jurisdiction, the liability of the assignor was fixed, the assignor not being obliged to pursue his debtor into a foreign jurisdiction. The court further said, the circumstance that the maker resided in another State, and that this was known to the plaintiff when he received the notes, did not vary the liability.

"In that case, it is true, the note was made in Chicago, while the maker was casually there, though living in Wisconsin, and it may be said he did not, literally, leave the State. But the court does not base its decision upon any verbal niceties, but upon the broad ground that the maker was absent from the State when the note matured, and the assignee was not bound to pursue him into a foreign jurisdiction. It is wholly immaterial whether the liability of the endorser, in such a case, be referred to that clause of the statute which charges him, when suit against the maker would be unavailing, or to the clause which makes him liable when the maker has left the State. He would be liable under either clause. A suit against the maker would be unavailing, because there could be no service of process upon him in our courts, and it cannot be supposed the legislature intended the maker should be pursued all over the world, or anywhere beyond the limits of our own State.

"That the endorsee shall not be required to pursue the maker into a foreign jurisdiction is clearly shown by the clause establishing the liability of the endorser if the maker should leave the State. The reason why he should be held liable in such an event, is simply because the endorsee ought not to be required to follow him into a foreign jurisdiction;

and the reason applies with the same force in all cases where the maker is absent from the State, whether he never lived here or left after making the note. By the phrase in the statute 'left the State' the legislature designed simply to indicate the fact of absence, so as to be beyond the reach of legal process. This construction is unavoidable, if the statute was intended to apply to notes made in another State, but assigned in Illinois; and that it does so apply was held by this Court in *Crouch v. Hall*, 15 Ill. 263, and, we have no doubt, rightly held. But the note in this case was made payable in Chicago, and the liabilities growing out of the assignment are, of course, the same they would have been if the note had not been made here."

The plaintiffs below presented in their declaration two grounds, on either of which a right of recovery was claimed: *First*, that the makers of the notes were not within the State of Illinois when the notes became due and payable; *second*, that a suit, when the notes became due and payable and ever since, would be unavailing, because the makers of the notes were insolvent. Diligence, by the institution of suits, was not alleged, but the excuses allowed by the statute for a failure to do so were averred.

While the language of the second or additional count is somewhat inaccurate, yet it is sufficient in substance. This count does not assert two distinct grounds of liability, one of insolvency and the other that suits would be unavailing, but only one, and that is that suits against the makers would be unavailing, because they were insolvent and the debts, for that reason, could not be collected. There may be different reasons why a suit would be unavailing, which would fix the liability of an assignor and enable the assignee

to recover on the assignment, but the reason must be set out specifically in the declaration, and a general averment that a suit would be unavailing is not sufficient. That is only the general conclusion based on the reason specified.

The Supreme court of Illinois has settled this point. In *Crouch v. Hall*, 15 Illinois, 264, the court say: "By the statute there are three contingencies in which the assignor may be held liable. 1. Where the assignee, by the exercise of due diligence, prosecutes the maker to insolvency. 2. Where the institution of a suit against the maker would be unavailing. 3. Where the maker has absconded, or left the State, when the note falls due. By the contract of assignment, the assignor undertakes to pay the note on the happening of either of these contingencies. It is not pretended in this case that the assignee has made use of any diligence by suit to obtain payment from the makers. The second count of the declaration alleges, that the bringing of a suit against the makers would be unavailing. This averment is too general. It ought to show why a suit would be unavailable, as that the makers were insolvent, or there was not consideration for the note. It should state the special cause so that the assignor might come prepared to meet it."

If the second count of the declaration in the case at bar had contained only a general statement that the suit against the makers would be unavailing, it would have been held bad on demurrer; but as there was an allegation that the makers were insolvent, coupled with such a general statement, this count was good. However the language may be arranged, it in substance sets forth the insolvency of the makers as the reason why a suit would be unavailing; and this construction

is the only one that could be considered on the trial of the issue.

Having called attention to the law governing this case, and the questions presented for the decision on the trial of the issue before the jury, I present the points on which the court erred.

Errors.

I.

Bankrupt proceedings as evidence that suit would be unavailing.

The court below admitted evidence to show that a petition in bankruptcy was filed January 20, 1870, at Milwaukee, against Kimball & Butterfield, the makers of three of the notes sued on, and a judgment of adjudication January 29, 1870. The transcript of the record did not show any further step, but there was testimony by parol, which was received without objection, that the debts of the petitioners had been settled and the proceedings dismissed; there was nothing, however, to fix the time when the order of dismissal was made.

The first note was due January 18, 1870, two days before the petition in bankruptcy was filed. The second note was due February 17, and the third, March 19, 1870; the first term of court held at Chicago after each note became due was on the first Monday of the following month.

It is admitted that this evidence would have been proper, and constituted a good reason why a suit at law would be unavailing while the bankruptcy proceeding was pending in the United States court, if the declaration had counted upon it.

But there was no allegation in either count which justified the admission of such testimony, or the charge of the court that it excused the assignees from instituting and prosecuting a suit against the makers of the notes.

The statute of Illinois, and the decisions of the Supreme court of that State construing the statute, fixes liability on the assignor only in case the assignee institutes and prosecutes a suit with diligence against the makers, unless: *first*, such a suit would be unavailing, giving the reason why it would be unavailing; or, *second*, the makers were out of the State when the note became due.

The established rules of pleading require the plaintiff to set forth the cause of action and ground of recovery, so as to notify the defendant of the case he has to meet. The general issue compels the plaintiff to prove the material averments of the declaration.

The *allegata* and *probata* must agree, and the plaintiff cannot recover on a cause of action not set forth in the declaration. These principles need no citation of authorities to support them.

In this case the plaintiffs in their declaration admitted, by implication, that they had not shown diligence by the commencement and prosecution of a suit, and, in the first count, alleged that the makers of the notes assigned, were not residents of the State of Illinois when such notes were given, and had not been since, and were not residents of the State when they became due. *Rec.* 3.

In the second count the plaintiffs alleged that the makers were insolvent and unable to pay the notes when they became due, and had continued so ever since, so that a suit against the

makers would have been and would be wholly unavailing. *Rec.* 8.

There was no other ground of liability or recovery set forth in the declaration.

I have already shown from the case cited, of *Crouch v. Hall*, 15 Ill. 264, that it is not enough to aver that a suit would be unavailing, without showing why it would be unavailing, and, therefore, the plaintiffs below were confined to the reason alleged, namely, that the makers were insolvent and unable to pay.

Under these circumstances it was error to admit the record from the bankrupt court at Milwaukee for the purpose of proving that a suit against Kimball & Butterfield would be unavailing. The defendants below had no notice of such a claim, and were not prepared to meet such evidence. It appeared by parol that these parties had settled the debts against them, and the bankruptcy proceeding had been dismissed, but the plaintiffs were careful to bring only a part of the record and to omit that which showed a termination of the proceeding. The defendants having no notice of the intention of the plaintiffs to produce any such proof, could not meet it by a copy of the remainder of the record from a foreign State. The court properly told the jury that the existence of the proceeding being proved, it was incumbent on the defendants to prove that it was terminated so as to allow a suit against the makers, yet the admission of such evidence, without notice in the pleadings, practically denied the opportunity to introduce it.

The court in presenting to the jury the branch of the case as to the non-residence of the makers, told them that a suit was necessary to charge the assignors unless a suit would have

been unavailing; and instructed them that the existence of the adjudication in bankruptcy would alone excuse the commencement of a suit, and render such a suit unavailing. As proof of the existence of such a judgment was before the jury, and there was no evidence as to when it had been set aside, (the burden of which rested upon the defendants). The jury had no discretion in the matter. This part of the charge of the court directed a verdict for the plaintiffs.

This is a clear error, because the fact of bankruptcy was not alleged in either count, as reason why a suit would be unavailing, and was not in issue before the jury.

If the plaintiffs had counted upon the bankruptcy proceeding, it would have been easy for the defendants to obtain a copy of the order of dismissal, and thus show that it was not in existence when at least two of these notes became due.

II.

The makers of the notes out of the jurisdiction of the courts of Illinois as a ground of recovery.

The language of the statute fixes the liability of an assignor when the "maker or makers had absconded, or left the State when such assigned note" became due, without diligence by suit. This seems to contemplate only cases where the maker had resided or been in the State when the note was given, and had left it before it was due. It was contended in *Mason v. Burton*, 54 Ill. 353 (*supra*), that this was the true construction, but the court held that the statute embraced all cases where the maker was out of the jurisdiction of the courts of the State, when the note became due.

Therefore, the allegation in the first count of the declar-

ation in this case, which averred that the makers, at the date of the execution, were not residents of the State of Illinois, but were at the time of the execution, ever since have been and still are not residents, and were not within the State of Illinois at the time when said notes became due and payable, is sufficient.

It will be observed that the statute does not speak of *residence* at all, and, as a party can always be sued where he is found for service, the first part of the averment, which declares that the makers were not *residents* of the State, would probably be an insufficient ground of recovery. But the latter part of the averment is, that the makers were not within the State when the assigned note became due and payable, and this brings it within the rule of law, as laid down in *Mason v. Burton.*

I insist that *actual residence* of the makers is entirely immaterial. The assignee is excused from diligence by suit whenever he is unable to ob'ain service of summons in the State so as to give the court jurisdiction; but the law compels him to show, by the return of an execution issued on a judgment, that the money cannot be collected, if the maker is within the jurisdiction so that a judgment can be obtained. No other rule is justified by the words of the statute or the decisions of the Supreme court of Iliinois.

In *Hilborn v. Artus*, 3 Scam. 346, (*cited supra*) it is held that a temporary absence from the State, when the note falls due, does not fix the liability, while an absence when the note becomes due, and over the first term of court thereafter, when suit might be brought, does not establish it, although the maker is a *resident* of the State.

In *Schuttler v. Piatt*, 12 Ill. 419 (cited *supra*) the court say: "If the maker is *beyond the limits of the State* when the note matures, *so that he cannot be subjected to our jurisdiction*, the liability of the assignor becomes fixed. The assignee is not bound to pursue the debtor into a foreign jurisdiction, but he may at once resort to his assignor for payment."

In *Pierce v. Short*. 14 Ill. 146 (cited *supra*), the court say: "The assignee must use due diligence to coerce payment from the maker, where such a course will result in the collection of the note. If he fails in this, he loses all recourse upon the assignor, unless he can show, either, that the note could not have been collected by the prosecution of a suit against the maker, or *that the maker was out of the jurisdiction and therefore beyond the reach of legal process.*"

In *Mason v. Burton*, 54 Ill. 354 (cited *supra*), the court, after approving the quotation, made above, from *Schuttler v. Piatt*, say: "The reason why he should be held liable, in such an event, is simply because the endorsee ought not to be required to follow him into a foreign jurisdiction; and the reason applies, with the same force, *in all cases where the maker* is *absent from the State, whether he never* LIVED *here, or left after making the note.* By the phrase in our statute, 'left the State,' the legislature designed simply *to indicate the fact of absence, so as to be beyond the reach of legal process.*"

These citations might be increased, but enough has been shown to establish the unvarying rule that actual residence is immaterial. In the one case an assignor may be charged on his assignment, if the maker is an actual resident, but is beyond

the jurisdiction of the court when the note matures; and, in the other, may be protected when the maker lives in another State, but is within the jurisdiction of the courts of Illinois when the paper becomes due.

There was evidence in this case that Kimball, one of the makers, was in Chicago, with his family, and a member of a firm of auctioneers in business in Chicage when one or more of the assigned notes matured. The evidence was such that it left some doubt as to the fact of actual residence, but none as to his being within the jurisdiction of the courts of the State of Illinois for a continuous period of two or three months, covering the time these notes fell due.

Under these circumstances the court informed the jury that an *actual residence* by Kimball was necessary to impose upon Claflin & Co. the duty of an effort to collect the notes from Kimball by suit.

Touching this branch of the court's charge, the plaintiffs in error complain of statements to the jury not justified by the evidence, and which had a direct tendency to produce a verdict against them.

There was evidence showing that Kimball had a wife but no children, and that he *removed* from Stevens Point, Wisconsin, to Chicago, with his wife, in January, 1870, where he became a partner in the auction house of J. W. Gilbert & Co., who did business on Clark street in that city. The witnesses knew of his living in the city for two or three months, perhaps more. This testimony was sufficient to justify the jury in concluding that Kimball became an actual resident of Chicago in January, 1870. If he did, then in the absence of any evidence that he had changed his residence and removed else

where, the law would presume that he continued to reside there. There was no testimony whatever that Kimball changed his residence from Chicago, yet the court told the jury, "He may have been a resident in January, and have left before the February and March notes became due. You will observe one became due in January, and the others in February and March, and therefore, it is possible, as you can see from the testimony, that Kimball may have been within the jurisdiction of the courts of this State during the month of January, and may have left. The testimony leaves the court and jury in the dark as to where Kimball went when he left the city, nor are we informed as to how long he stayed. But the testimony of Mr. Clapp and his bookeeper Farnum, would seem to indicate that his stay did not continue long."

This is contrary to the rule of law, because it proceeds upon the ground that it was incumbent on the defendants, after proving that Kimball had removed to and become a resident of Chicago, to prove by positive testimony that such residence continued until *all* of these notes became due. On the contrary, it was the duty of the court to inform the jury that if they found, from the evidence, that Kimball took up his residence in Chicago in January, 1870, they would presume it continued, in the absence of evidence to the contrary, and the burden of such proof rested on the plaintiffs. And the jury ought to have been informed, that there might be no ground of recovery on one of the notes due in January, if Kimball was in Chicago when it matured.

Again, the court misstated the evidence on this point. The jury were told that the length of time Kimball remained was very indefinite, and that the court and jury were not informed how long he stayed, and speculated by saying that he

may have left before the February and March notes became due. Now, Farnum testified that Kimball removed to Chicago in January, and he did not know how long he remained; but Clapp testified that he was in Chicago for *one or two months, perhaps more*, and during that time the firm of which he was a member, in Chicago, purchased goods from the witness, sold them at auction, and paid for all goods purchased.

These remarks were not justified by, but were contrary to, the evidence.

III.

The insolvency of the makers as a ground of recovery.

The second count of the declaration declares that at the time when the assigned notes became due, the makers were insolvent and unable to pay the amount of the notes, *and from thence have continued insolvent* and unable to pay the amount of the notes, or any portion thereof.

It will be observed that insolvency, at the time the notes were due, was not deemed sufficient by the pleader, but continued insolvency down to the time of the commencement of the suit was alleged. This was necessary. In *Bledsoe v. Graves*, 4 Scam. 385 (cited *supra*), the Supreme court of Illinois has expressly decided that the assignee may immediately sue the assignor when the note matures, if the maker is at that time insolvent; but, that if he sees fit to lie by for a year or two, and then relies upon the insolvency of the maker, he must prove that the maker was insolvent *during the whole time between the maturity of the note and the commencement of the suit.*

It was, therefore, necessary for the plaintiffs below to

prove that Kimball & Butterfield were insolvent when the notes matured, and continued so till March, 1871, when this suit was commenced by them against the assignors.

The evidence on the question of insolvency was very brief. There was no testimony whatever in regard to the financial condition of Simeon Pickard, the maker of one of the notes, who resided in Michigan. Mr. Dale testified that he held certain claims for collection against Kimball & Butterfield, which had not been paid when due; and on which he commenced proceedings in bankruptcy, in Milwaukee, which resulted in the settlement of the demands which he held. Farnum testified that Kimball & Butterfield had failed at Stevens Point. Clapp testified that Kimball & Butterfield were in debt to him, for goods furnished to them for their store at Stevens Point, to the amount of about $2,000, which had not been paid in full. No suit had been brought for this debt, and he could not tell how much had been paid by them because his brother had charge of the collection of debts. This was all the evidence in the case.

It will be seen that this is very weak testimony to show insolvency at any time, and certainly, it cannot be claimed that the plaintiffs proved continued insolvency from January, 1870, till March, 1871. According to the decision of *Bledsoe v. Graves*, it was necessary for them to prove by positive testimony, the continued insolvency, during the whole intervening time between the maturity of the notes and the commencement of the suit.

The court omitted entirely to state to the jury the correct rule of law on this point. The only statement made in the charge of the Court to the jury affecting both Kimball and Butterfield is this: "If you are satis-

fied that the firm of Kimball and Butterfield had failed, then, within the meaning of the law, the plaintiffs were excused, and the law will be for the plaintiffs." *Rec.* 20. In the same connection the Court addressed some remarks to the jury in regard to the solvency of Kimball, in which it was stated that "if he was not possessed of visible property out of which these debts could have been made; if he was merely here with an interest in an auction firm which he could withdraw on any day, and which, perhaps, consisted merely in his personal services; if you are satisfied, from the testimony, that he had no visible funds, moneys, or assets within the State which could have been levied upon, and from which the debts could have been collected," then they would find for the plaintiffs on the ground of insolvency.

When it is considered that the plaintiffs had alleged in their declaration continued insolvency for a period of fifteen months, and that the law imposed on them the burden of proving this allegation by competent evidence, and that the evidence was entirely insufficient to maintain the allegation, it will be seen that the charge of the court to the jury upon this point is contrary to law. The court assumed that an interest in an auction firm was a temporary or intangible interest which could be ended at the will of the party any day, and which consisted merely in personal services. There was no proof to justify any such assumption. The jury were informed that if they were satisfied, from the testimony, that Kimball had no visible funds, moneys, or assets, they would find for plaintiffs without any statement that the law required the plaintiff to prove that he had no such property, subject to execution at any time, and in this the Court erred.

Again, two other witnesses testified that Kimball and

Butterfield had failed without specifying when, or of what such failure consisted, yet the court informed the jury that if they were satisfied that they had failed, the assignees were not required to commence suit against them. As I understand it, failure is not insolvency. These parties were merchants, and whenever they omitted to pay mercantile paper when due, it could properly be said, according to the ordinary meaning of the word, that they had failed, but, by no means, that they were insolvent. The instances in this country are numerous where commercial paper is not met at maturity, and yet the parties prove solvent and pay their debts, even without process of law.

It seems unnecessary to discuss this branch of the case further, because the error is so manifest upon the face of the record.

IV.

Conclusion.

The merits in this case are with the plaintiffs in error. It appears from the testimony that they turned over these notes in part payment of some indebtedness. The letter of the attorney of Claflin & Co. shows that he had resorted to some questionable means in procuring these notes from Wills, Gregg & Co., and that he intended after (to use his own word) *squeezing* all he could out of them, to put them into bankruptcy on behalf of Claflin & Co., whom, he said, were their only creditors. There was no expectation whatever of relying upon Wills, Gregg & Co. as assignors. The notes were immediately forwarded to Claflin & Co., in New York, where they seemed to have locked them up, and subsequently received payment of one of them from Kimball & Butterfield.

The notes were kept in New York by Claflin & Co. for fifteen months. No effort was made to collect them, and no notice of non-payment was given to the assignors. It may be inferred that after the expiration of these fifteen months, Claflin & Co. concluded it was easier, or more agreeable, to collect these notes from the assignors than from the makers, and they accordingly commenced the present suit.

On the trial the defendants below were surprised by the production of proceedings in bankruptcy against Kimball & Butterfield, from a foreign State, which had been dismissed and which were not set up in the declaration. The plaintiffs, not content with the production of the evidence that such proceedings had been commenced, were guilty of omitting to procure the whole record which showed that the proceedings had been dismissed. The presumption is, that if the order of dismissal had been produced by them, it would have operated to their prejudice, and have shown the dismissal before the last two notes were due. The testimony itself, on the question of insolvency, and on the question of absence from the State, was very meagre and unsatisfactory, and while this court will not review the findings of the jury as to questions of fact, it will, notwithstanding, look into the evidence for the purpose of determining whether the questions of law were properly decided and substantial justice done.

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SUPREME COURT

OF THE UNITED STATES.

No. 289.

JOHN S. WILLS,
JAMES Q. WILLS,
WASHINGTON H. WILLS,
AND RICHARD GREGG,
Plaintiffs in Error.

VS.

HORACE B. CLAFLIN,
EDWARD E. EAMES, AND
EDWARD W. BANCROFT,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Argument for Defendants in Error.

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ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was an action brought in the Circuit Court of the United States for the Northern District of Illinois, by defendants in error against plaintiffs in error, upon their indorsements of four promissory notes; one dated Chicago, Nov. 12, 1869, for $300, drawn by Simeon Pickard, payable sixty days after date to Wills, Gregg & Co.; and

three other notes, dated "Stevens Point, Wis.," Nov. 16, 1869, all drawn by Kimball & Butterfield, one for $500, payable in sixty days; one for $1,526.67, payable in three months, and one for $2,000, payable in four months. All four of said notes were payable to Wills, Gregg & Co., plaintiffs in error, and were by them assigned to defendants in error by indorsement. (Notes copied on page 5 of "Transcript of Record.")

Defendants in error, as the assignees of said notes, sued plaintiffs in error as the assignors thereof, it being averred in the first count in the declaration that the makers of said notes, to-wit: Simeon Pickard and Kimball & Butterfield, who had failed to pay the same when due, "were not, at the date of the aforesaid execution of their respective notes, residents of the State of Illinois, nor was either of them, at the date of such execution, a resident of said State, but that they were, each and all of them, at the time of the execution by them of said notes respectively, ever since have been, and still are now, residents of the State of Illinois, etc.

A second count in the declaration, after alleging the failure of said makers to pay said notes, averred the *insolvency* of said makers at and after the maturity thereof, and that by reason of such insolvency "the institution of a suit against the said Simeon Pickard, or against the said Kimball, or the said Butterfield (the makers), at the time the notes so by them as aforesaid respectively subscribed, became due and payable, or at any time since, or now, would have been and would be wholly unavailing."

Issue was joined, trial had by jury, and a verdict rendered in favor of defendants in error at the October term of said court, A.D., 1872, for five thousand and twenty-two dollars ($5,022.)

A motion for a new trial was entered, argued, and taken under advisement.

At the December term of said court the motion for a new trial was overruled, and judgment entered on the verdict of the jury.

A bill of exceptions was signed, and the case brought by writ of error to this court.

BRIEF.

MAY IT PLEASE THE COURT:

The defense set up in this case was under the peculiar statute of Illinois, as to the liability assumed by one who assigns a negotiable instrument by endorsing his name on the back of it.

The provision of the statute, as it was at the time of the endorsements of said notes by plaintiffs in error, was as follows:

"Every assignor or assignors, or his, her, or their heirs, executors or administrators, of every such note, bond, bill, or other instrument, in writing, shall be liable to the action of the assignee or assignees thereof, or his, her or their executors or administrators, if such assignee or assignees shall have used due diligence by the institution

and prosecution of a suit against the maker or makers of such assigned note, bond, bill, or other instrument of writing, or against his, her or their heirs, executors or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof: *Provided*, that if the institution of such suit would have been unavailing, or that the maker or makers had absconded or left the State, when such assigned note, bond, bill, or other instrument, in writing, became due, such assignee or assignees, or his or her executors or administrators may recover against the assignor or assignors, or against his, her, or their heirs, executors or administrators, as if due diligence by suit had been used."

Plaintiffs in error claimed exoneration from all liability on account of their said endorsement of said notes, because defendants in error had not used "due diligence by the institution and prosecution of a suit" against the makers of said instruments.

It was not claimed on behalf of defendants in error that any suit had been instituted against the makers of said notes, but it was insisted that the case was within the exceptions made in the law, and that defendants were excused from instituting suit against said makers.

First. Because at the time the said notes respectively matured, the makers thereof were non-residents of the State of Illinois. And

Secondly. Because if suit had been commenced against

either or all of said makers, it would have been unavailing, by reason of the insolvency of said makers.

It is well settled that if the maker of a note sued upon was beyond the limits of the state when the note matured, so that he could not be subject to the jurisdiction of the court in which suit must be brought against the assignor, the liability of the assignor becomes fixed. The assignee is not bound to pursue the debtor into a foreign jurisdiction, but he may at once resort to his assignor for payment.

Mason v. *Burton*, 54 Ill., 353.
Crouch v. *Hall*, 15 Ill., 264.
Schutler v. *Piatt*, 12 Ill., 417.
Pierce v. *Short*, 14 Ill., 146.
Lee v. *Selleck*, 33 N. Y., 618.
Alcott v. *Tioga R. R. Co.*, 20 N. Y., 210.

The evidence in the case, as the same appears in the bill of exceptions, clearly shows that all of the makers of said notes were, at the time they signed the same, non-residents of the State of Illinois. And further, that they continued to be non-residents of the state from that time on.

Plaintiffs in error only attempted to prove the residence of one of the said makers to have been in Illinois at the date of the maturity of one, or at furthest two, of the notes sued on. An attempt was made to show that Kimball, one of the firm of Kimball & Butterfield, makers of the notes maturing respectively on the 16th days of January, February and March, 1870, became a resident of Illinois sometime in January, 1870, and it was therefore legitimate and necessary to make inquiry as to the *nature*

and *duration* of Kimball's stay in Chicago, as tending to show an *intention* on his part to give up his former residence in Wisconsin, and to make his permanent future domicil and home in Illinois. The evidence, circumstantial, or positive and direct, should be such as to convince the minds of the jury that Kimball, when he came to Chicago in January, 1870, intended and did actually change his residence and home from Wisconsin to Illinois.

Wherefore, as in a proper manner directing the minds of the jury to the *duration* and character of Kimball's stay in Chicago as circumstances indicatory of a change of residence on his part, or the contrary, the expressions excepted to in the charge of His Honor, Judge Blodgett, (Transcript of Record, page 18,) to wit: "how long is very indefinite," "he may have been a resident and left before the February and March notes became due," "nor are we informed as to how long he stayed," etc., were unexceptionable.

The proof upon this point is altogether too shadowy and indefinite to base a belief upon that Kimball in January, 1870, or at any time became an *actual resident* of the state. It was in proof merely that he came some time in January, 1870, to Chicago, and engaged in an "auction" business; but no witness testified how long he remained in Chicago, only that he "*remained here one or two months, perhaps more.*" There is no proof that Kimball ever became an actual resident of Illinois.

Spragins v. *Houghton*, 2 Scammon, 396.

The business he engaged in was not such as to indicate

a permanent location in Chicago. The statement of the witness that "he was here for one or two months, and perhaps more," implies that his stay in Chicago was very limited in duration, and that soon after coming here he left, and that he did not intend to, and did not, actually become a "resident" or "inhabitant" of the state.

The law on the subject of domicil and residence, as to what constitutes the same, and as to what is necessary to establish a change of domicil or residence is familiar.

The Supreme Court of Illinois, by Breese, J., in *Amherst Hays et al.* v. *Maria B. Hays et al.*, decided at Ottawa, January, 1875, and given in the *Chicago Legal News*, Vol. VII, No. 23, page 183, have given an ample statement of this law of domicil. The Court say in the above case; "In a strict legal sense that is the domicil of a person where he has his true, fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Actual residence is not indispensable to retain a domicil after it is once acquired, but it is retained *animo solo* by the mere intention not to change it and adopt another.

"To effect a change of domicil there must be an actual abandonment of the first domicil, coupled with an intention not to return to it, and there must be a new domicil acquired by actual residence within another jurisdiction coupled with the intention of making the last acquired residence a permanent home."

"The original domicil of the party always continues until he has fairly changed it for another, even though he

has intentionally forsaken it. There must be *intention and act* united to effect a change of domicil. A new domicil is not acquired by residence unless taken up with an intention of abandoning the former domicil." 2 Kent's Com., star p. 430, note f.

The actual residence of Kimball in Wisconsin prior to January was not denied. This residence is presumed to continue until evidence of a *change of residence* is shown.

This can not be inferred from the mere fact that he was in Chicago, and even engaged in business here for a short time. The *act* and the *intent* must combine. The burden is upon the party alleging a change of residence, to show such change by proof satisfactory to the jury. In the nature of things it can never be difficult to prove by the most convincing and satisfactory evidence, so notable a matter as is a permanent change of residence. The person himself alleged to have made the change, his family, his friends, neighbors and acquaintances as are all cognizant of it, when it takes place, are competent and easily obtained witnesses thereto.

In this case nothing of a definite and positive character, no declaration on the part of Kimball was proved as to the alleged change of residence by Kimball! The jury were therefore well warranted in deciding as they did by their verdict that no change of residence had been shown, and that Kimball was, at the maturity of said notes, a non-resident of Illinois. That Simeon Pickard and Butterfield were non-residents of Illinois, was not questioned.

It being established, therefore, that all of the makers of the notes sued upon were, at the maturity thereof, non-residents of Illinois, the assignees were excused from bringing suit against either or all of them when the notes matured, and had a right to hold their assignors primarily liable.

The case might safely rest upon this point.

It is, however, not less clear that defendants in error were, under the second exception in the statute above given, excused from instituting suit on either of the notes made by Kimball and Butterfield, on the ground that such suit would have been unavailing, even if they had changed their residence and become residents of Illinois.

Of the insolvency of both Kimball and Butterfield at the maturity of said notes in January, February and March, 1870, no more conclusive proof could have been produced than that which was produced, to-wit, that on the 20th day of January, 1870, a petition, properly verified on the 18th day of the same month, was filed in the United States District Court in and for the Eastern District of Wisconsin, to have the firm of Kimball & Butterfield adjudicated bankrupt, because of an act of bankruptcy by them committed on January 13, 1870.

And further proof that another petition to have said firm adjudicated bankrupt, was filed in said court on Jan. 25, 1870. And, further, that on the 29th day of January, 1870, said Geo. W. Kimball and said William Butterfield, composing said firm of Kimball & Butterfield, were by said court duly adjudicated bankrupts.

Here was the highest and most conclusive proof of the actual, adjudicated bankrupt condition of both Kimball and his partner, Butterfield, in January, 1870.

The fact of the adjudication in bankruptcy having been proved by the record of the proceedings in the United States District Court in Wisconsin to have been on January 29, 1870, and the pendency of said proceedings not being disproved or denied by plaintiffs in error, was conclusive proof that any suit against Kimball or Butterfield at the time of the maturity of said notes in January, February and March would have been unavailing. Not only so, but, as charged by his Honor, under such a state of facts defendants in error had no right to prosecute in this or in any other state, and an injunction would have issued to prevent the prosecution of such a suit if it had been instituted.

In addition to this, W. B. Clapp, a witness called by plaintiffs in error, gave as one of the reasons—certainly of itself a sufficient explanation — why the firm of W. B. Clapp & Co. did not sue Kimball while he was in Chicago in the early part of 1870, was that "they did not think it would do any good."

We submit, therefore, that the charge of the Court placed the whole case and all the circumstances fairly before the jury, and left to them, as triers of the facts, the business of deciding, upon a weighing of the testimony in the case by them, as to whether the proof showed and convinced, or failed to show and convince them that, at the

time of the maturity of said notes, a suit against Kimball thereon would have been of effect or unavailing.

In the language of Chief Justice Lawrence, in *Mason* v. *Benton*, 54th Ill. 354: "It is wholly immaterial whether the liability of the endorser in such a case be referred to that clause of the statute which charges him when suit against the maker would be unavailing, or to the clause which makes him liable when the maker has left the state. He would be liable under either clause."

BENTLEY & QUIGG,
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SUPREME COURT

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